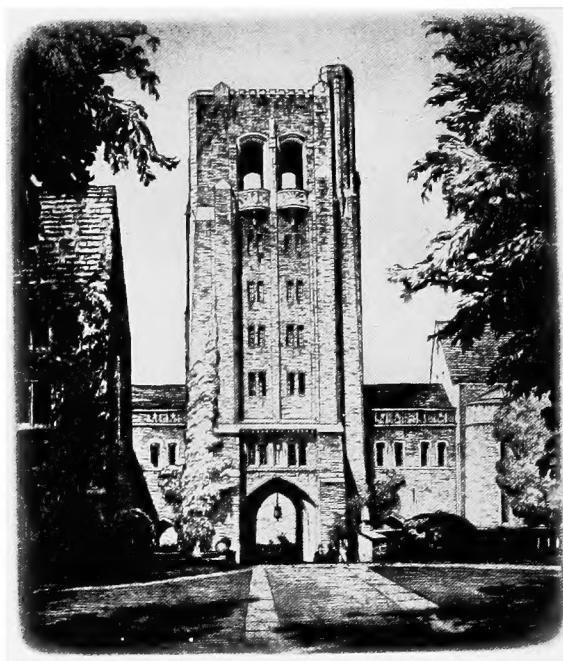




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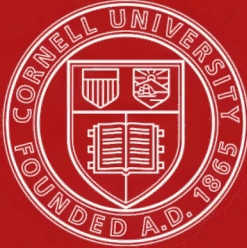
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A Treatise

ON THE LAW OF

BANKS AND BANKING

By the Editorial Staff of The Michie Company

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE

Volume III

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BANKS AND BANKING

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IV. NATIONAL BANKS.

§ 232. **Nature and Status.**—National banks are instruments designed to be used to aid the government in the administration of the public service, created for a public and national purpose, and appropriate to that end.¹ They are public institutions and operate as fiscal agents of the government,² notwithstanding they are the subject of private ownership.³

1. **National banks defined.**—*Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Ran-kin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29; *Bank v. State*, 58 W. Va. 559, 52 S. E. 494. See post, "Regulation and Supervision in General," § 235.

National banking corporations are agencies or instruments of the general government, designed to aid in the administration of an important branch of the public service, and are an appropriate constitutional means to that end. *Pollard v. State*, 65 Ala. 628.

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Such being the nature of these national institutions, it must be obvious that their operations can not be limited or controlled by state legislation." *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288. See post, "Power to Control and Regulate," § 233.

National banks are created by virtue of the banking laws of the United States, and are held to be instruments designed to be used to aid the United States government in the administration of an important branch of the public service. *Brooks v. State* (Tex. Civ. App.), 58 S. W. 1032, 1034.

"The qualities, powers, and duties, as national agencies, of these associations, resemble, in almost all essential particulars, those of the Bank of the United States authorized by the act of April 10th, 1816. Like that bank, they are organized under national legislation. Their capital, like four-fifths of the capital of that bank, is supplied by individual subscriptions. They are employed, like that bank, as agents and depositories of the national government." (Dissenting opinion of three judges.) *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 1 L. Ed. 229.

"The national banking associations are much more intimately connected in their functions and operations with the national government, than was the Bank of the United States. They are, therefore, entitled to all the protection and all the immunities to which that bank was entitled." (Dissenting opinion of three judges.) *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229.

"The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States, and intended to be the banking system for the whole country, territories as well as states." *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594.

2. **Operation as fiscal agent of government.**—National banks are fiscal agents of the federal government. *Adair v. Robinson*, 6 Tex. Civ. App. 275, 25 S. W. 734, affirmed in 93 Tex. 635, no op.

3. **Although subject to private ownership.**—*Guthrie v. Harkness*, 199 U. S. 148, 157, 50 L. Ed. 130, 26 S. Ct. 4;

They are created for the purpose of establishing a currency for the whole country and to provide a market for the loans of the general government, and not solely for private gain.⁴

Farmers', etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

4. To provide a national currency.—*Lionberger v. Rouse* (U. S.), 9 Wall. 468, 19 L. Ed. 721; *Twin City Bank v. Nebeker*, 167 U. S. 196, 42 L. Ed. 134.

"The object had in view by the passage of the act authorizing national banks, was to create a national currency secured by United States bonds. The successful operation of these banks it was supposed would materially aid the government itself in its various departments." *McLaughlin v. Chadwell*, 54 Tenn. (7 Heisk.) 389.

As said in *Tiffany v. National Bank* (U. S.), 18 Wall. 409, 21 L. Ed. 862, national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks." *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732.

"The object of the act, as its title imports, was to create a national currency secured by a pledge of the bonds of the United States. And to that end it requires security in government bonds for all notes issued; and in case any bank fails to redeem its notes on demand, it provides for their payment on presentation at the treasury of the United States." *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687.

The federal legislation creating and regulating national banks has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. Having due regard to the national character and purposes of that system, national banks, in respect to the powers conferred upon them, are not to be viewed as solely organized and operated for private gain. The principles enunciated in *McCulloch v. Maryland* (U. S.), 4 Wheat. 315, 4 L.

Ed. 579, and in *Osborn v. United States Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204, though expressed in respect to banks incorporated directly by acts of congress, are yet applicable to the latter and present system of national banks. *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288. See *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561. See, also, *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, where it was said that the intent was to create a national banking system coextensive with the territorial limits of the United States, states and territories as well, and uniform therein.

The United States Bank.—The United States Bank was not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank was not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch v. Maryland* (U. S.), 4 Wheat. 315, 4 L. Ed. 579, is founded on, and sustained by, the idea that the bank was an instrument which was "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and had supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It was undoubtedly capable of transacting private as well as public business. *Osborn v. United States Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204.

The charter of incorporation of the United States Bank not only created it, but gave it every faculty which it possessed. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue

Source of Authority.—The national banks are authorized to pursue their banking business by virtue of acts of congress.⁵

Citizenship.—Equally with state banks, national banks are citizens of the state in which they are located, in the sense that corporations are citizens; and this result follows from the act which creates such associations.⁶ A national bank located in another state is a foreign corporation, within a statutory provision that every corporation is a "foreign corporation," except corporations created by state law, or by federal or colonial law, and located in the state.⁷

§ 233. Power to Control and Regulate—§ 233 (1) Power of Congress.—The congress of the United States, having power to incorporate national banks, they being organized under national legislation,⁸ and created for a public and national purpose and appropriate to that end,⁹ has power to control and regulate them.¹⁰

on those contracts, was given and measured by its charter, and that charter was a law of the United States. This being could acquire no right, make no contract, bring no suit, which was not authorized by a law of the United States. It was not only itself the mere creature of a law, but all its actions and all its rights were dependent on the same law. *Osborn v. United States Bank* (U. S.). 9 Wheat. 738, 6 L. Ed. 204.

5. Source of authority.—*National Bank v. Chattanooga*, 55 Tenn. (8 Heisk.) 814. See post, "Organization and Corporate Existence," § 236.

6. Citizenship of national banks.—*Linton v. Childs*, 105 Ga. 567, 32 S. E. 617. As to national banks as citizens, see post, "Injunctions," § 279.

7. Foreign corporations.—*Beckham v. Hague*, 44 App. Div. 146, 60 N. Y. S. 767, reversing 28 Misc. Rep. 753, 60 N. Y. S. 213.

A national bank is a foreign corporation. *Merchants' Nat. Bank v. McNaughton* (N. Y.), 1 Abb. N. C. 293 (note).

8. Power to incorporate.—Power to make by-laws, see post, "Statutory Provisions," § 234; "By-Laws," § 240; "Transfer of Stock," § 243.

Congress has power to incorporate a bank. *McCulloch v. Maryland* (U. S.), 4 Wheat. 315, 4 L. Ed. 579. See *Brooks v. State* (Tex. Civ. App.), 58 S. W. 1032, 1034; *National Bank v. Chattanooga*, 55 Tenn. (8 Heisk.) 814.

9. Public and national character.—See ante, "Nature and Status," § 232.

10. Power of congress to control and regulate.—*Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452; 23 S. Ct. 288;

Van Allen v. Assessors (U. S.), 3 Wall. 573, 18 L. Ed. 229; *Brooks v. State* (Tex. Civ. App.), 58 S. W. 1032, 1034.

National banks, as instrumentalities of the federal government, created for a public purpose, are necessarily subject to the paramount authority of the United States. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85; *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations. *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687; congress has directly dealt with the subject of insolvency of such banks by giving control to the secretary of the treasury and the comptroller of the currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers, and it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers

Powers Conferred.—Congress can confer upon a national bank such powers and immunities as it sees fit.¹¹

§ 233 (2) Power of States.—National banks are instrumentalities of the federal government, and any action of a state which impairs their efficiency as such governmental agencies, or interferes with their legitimate business as banks, is unconstitutional and void.¹² Where congress has con-

bestowed upon them by the general government. *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288.

"It is true that for some purposes a national bank is a public institution, notwithstanding it is the subject of private ownership. It may issue bills, which circulate as part of the currency of the country. It is subject to examination and in a large measure to the supervision of the comptroller of the currency. It is examined at stated periods, and may be the subject of special examination by order of the comptroller. * * * 25 Stat. 433." *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

The national banking act constitutes by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

"Under § 5240, the appointment of bank examiners was provided for, with power to make thorough examination into the affairs of any bank, and in doing so to examine any of the officers and agents on oath, and make a full and detailed report to the com-

troller." *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

"By § 5211, every bank was required to make not less than five reports during each year, under the oath of the president or cashier, and attested by at least three of the directors, exhibiting in detail the resources and liabilities of the bank, and the comptroller could call for special reports." *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

11. Powers conferred.—*Farmers'*, etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. For treatment of the various rights, duties and powers of national banks, see the appropriate sections throughout this chapter.

12. Power of state to control.—*Larabee v. Dolley*, 175 Fed. 365; *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85; *First Nat. Bank v. Kentucky* (U. S.), 9 Wall. 353, 19 L. Ed. 701; *Farmers'*, etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732; *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

The state is without authority to enact laws, either in the form of constitution or statute, that in any manner conflict with the national banking act, or interfere with or undertake to regulate or control the business that national banks are authorized by such act to carry on. *First Nat. Bank v. Commonwealth*, 143 Ky. 816, 34 L. R. A., N. S., 54, 137 S. W. 518.

"A national bank, or any other corporation which congress, in the exercise of its legal powers, may authorize to be organized and operated, must be allowed to pursue the business and purpose of its organization, and exercise all the powers necessary or incident to such business, without any

ferred upon national banks certain powers and immunities the state can in no manner interfere therewith except as permitted by congress.¹³ Such

restraint by or accountability to state laws." *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

"The state could rightfully pass no law, police or other, that would hinder or obstruct the bank in the prosecution of the business which, under the act of congress, it was authorized to do, and its powers should be liberally regarded, in order to avoid any possible friction between the federal and the state governments." *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

The purpose of the national banking laws is to establish a banking system uniform throughout the United States. No state can, either through its legislature or its courts, abridge the power thus conferred. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108, 115.

"The national banks organized under the acts of congress are subject to state legislation, except where such legislation is in conflict with some act of congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation. This doctrine was clearly and distinctly announced in *First Nat. Bank v. Kentucky* (U. S.), 9 Wall. 353, 19 L. Ed. 701, and that case has been often referred to since, with approval, in this court." *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. Ed. 790, 8 S. Ct. 961.

Since congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute, it did not intend to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities. *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288; *Tiffany v. National Bank* (U. S.), 18 Wall. 409, 21 L. Ed. 562; *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732.

"In so far as not repugnant to acts of congress, the contracts and dealings of national banks are left subject to the state law" *Davis v. Elmira Sav.*

Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

National banks are instrumentalities of the federal government, and as such are necessarily under the paramount authority of the United States. *State v. Clement Nat. Bank* (Vt.), 78 Atl. 944.

"As an instrumentality of the federal government, it is protected from hostile legislation by the supremacy of the federal constitution. Independently of specific prohibitions, the state has no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of constitutional laws enacted to carry into execution the powers vested in the general government." *Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922; citing *McCulloch v. Maryland* (U. S.), 4 Wheat. 315, 4 L. Ed. 579.

Application of state statutes.—As to application of state law to criminal liability of officers, see post, "Evidence," § 257 (3); "Receiving Deposits after Insolvency," § 256 (4). As to application of state statutes to contracts of national bank, see post, "In General," § 260 (1). As to criminal prosecution, under the state statute, for taking usury, see post, "What Law Governs—Application of State Laws," § 270 (1).

Taxation.—As to power of states to tax national banks, see post, "Taxation," § 324 (1).

13. Interference with powers by state.—Farmers', etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

Organized national banks are "instruments designed to be used to aid the government in the administration of an important branch of the public service. * * * Being such means, brought into existence for this purpose and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as congress may see proper to permit. Farmers', etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196." *Linton v. Childs*, 105 Ga. 567, 32 S. E. 617.

It is doubtless true that whatever congress has authorized it to do it must be allowed to do without interference by the state. *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

A federal statute which provides that national banks, "for the purposes of

banks are responsible alone to the national government, and are as independent of state legislation or interference as the army, navy, mint, or judicial tribunals of the United States.¹⁴ But there is a well-recognized limitation to the protection which this federal supremacy secures to a national bank. It protects the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government.¹⁵ The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from state laws as are necessary to enable it to effect the legitimate national objects for which it is created.¹⁶ It is too broadly stated to say that a national bank, because created under and by authority of congress, is entirely independent of all police authority of the state.¹⁷ It is true that the state may not hinder such a bank in the discharge of its duty, but the line which limits its duty must also limit its freedom from accountability to state authority.¹⁸ Since it may be laid down as a general proposition that national banks, as federal agencies, are exempted from state legislation only so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve the national government,¹⁹ so a statute which merely operates as an incidental restriction

all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located," refers exclusively to civil actions, and the right of the state to punish a national bank for a violation of its police laws can not be predicated upon it. *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

In *Hambricht v. Cleveland Nat. Bank*, 71 Tenn. (3 Lea) 40, 31 Am. Rep. 629, it has been held: "That National Banks organized under the act are instruments designated to be used to aid the government in the administration of an important branch of the public service; and congress, which is the sole judge of the necessity for their creation, having brought them into existence, the state can exercise no control over them, nor in anywise affect their operation, except in so far as it may see proper to permit."

No state can, either through its Legislature or its courts, abridge the powers conferred by The National Banking Act. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

"The state can exercise no control over a national bank, nor in anywise affect its operation, except as congress may permit." *Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922, citing *Farmers', etc., Nat.*

Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196.

14. Responsible alone to federal government.—*Pittsburg v. First Nat. Bank*, 55 Pa. 45.

15. Recognized limitation to protection.—*Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922, citing *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181.

16. Power to confer immunity from state regulations.—*First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438; *Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922.

17. Not entirely independent of state control.—*State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

18. Limit of immunity.—*State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

19. Thomas v. Farmers' Bank, 46 Md. 43.

A construction of the Act of congress of 1864 (13 Stat. 99), establishing national banks, which would bring it in conflict with state laws, would render it unconstitutional. *First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438.

"In *National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 19 L. Ed. 701, where the question was as to the right of the state to tax shares of stock of a national bank, Mr. Justice Miller, in speaking of the right of the

upon the business of the latter bank, touches only the general business relations of the bank, having no appreciable effect upon its continuance and utility as an agent of the federal government, is within the power of a state²⁰

Matters within State Control.²¹—It seems manifest that a national bank must be subject, in a great many respects, to the general laws of the state. They are subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, the creation of debts, and liability to suit.²² A state law requiring cashiers

state to legislature over and control the instrumentalities of the federal government, and of the limits of such right, says: 'That limitation is that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. * * * It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

The rule that a state can exercise no control over a national bank, or in any manner affect its operation except as congress may permit, excepts the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government. *State v. Clement Nat. Bank (Vt.)*, 78 Atl. 944.

20. Statute merely incidentally affecting business relations.—*Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922.

V. S., § 1306, providing that negotiable paper may be attached before notice of transfer, and that paper actually transferred to a bank within the state before due is not subject to attachment, merely enables banks within the state to discount with safety paper a bank without the state could not discount without risk, and is not unconstitutional, as it does not affect the continuance and utility of federal banks as agents of the government. *Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. Rep. 922.

21. Subject to general law of state.—*Steadman v. Redfield*, 67 Tenn. (8 Baxt.) 337; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701.

22. Contracts governed, etc.—*Steadman v. Redfield*, 67 Tenn. (8 Baxt.)

337; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701; *Merchants' Nat. Bank v. Ford*, 124 Ky. 403, 30 Ky. L. Rep. 558, 99 S. W. 260.

Ky. St. 1903, § 483, placing notes payable and negotiable at banks organized in the state under the state or federal laws, and indorsed to, or discounted by, any such bank on the same footing as foreign bills of exchange, violates no rights secured to national banks by acts of congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit. *Merchants' Nat. Bank v. Ford*, 124 Ky. 403, 30 Ky. L. Rep. 558, 99 S. W. 260.

"Where a particular contract is made by a national bank which from its nature gives rise at the time of the contract to a claim on a specific fund, such claim, if not violative of the act of congress, will be allowed." *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

"The claim that the security vested in the bank by the conveyance of the land is taken away from it in violation of the United States law, because, under the Massachusetts law, a contract by a debtor giving a fraudulent preference to one creditor over another, is voidable and not void, is without merit. This contention concedes that if the state law rendered the transaction void there would be a valid exercise of state authority. But the power to do the greater necessarily carries with it the right to do the lesser. Nor is there anything in the opinion of this court in *Davis v. Elmira Savings Bank*, supra, which supports the argument of the plaintiff in error. There, the conflict between the state and the federal law was found to be express and irreconcilable, bringing that case, therefore, under the exception to the general rule. The opinion carefully confined

of national banks to transmit to the clerks of the several towns in which any stockholders of national banks should reside a list of the names of such stockholders, does not conflict with the law of congress, so far as it relates to national bank shares owned by residents of the state.²³ The state legislature may authorize the sale, under execution, of national bank stock.²⁴

Matters beyond State Control.—The state cannot limit or interfere with the transferable quality of national bank stock.²⁵ Nor can a state control and regulate the receipt of deposits.²⁶ The state is without power to enact special criminal statutes applicable to banks organized and operating under the laws of the United States.²⁷

the ruling there made to such a case, so as to render it inapplicable in a case like the one now before it." *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85.

"As regards the construction of contracts, the acquisition and transfer of property, the collection of debts and the liability to suit, the bank remains under the control of the state." *Hawley v. Hurd*, 72 Vt. 122, 47 Atl. 401, 402, 52 L. R. A. 195, 82 Am. St. Rep. 922, citing *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701.

A state law which forbids a transfer of property, with a view to a preference, in case of insolvency, where the transferee has reasonable cause to believe that the transferrer is insolvent or in contemplation of insolvency, controls the contracts or dealings of a national bank, where there is no express conflict between the grant of power by the United States to the bank to take real estate for previous debts, and the provisions of the state law, which, although allowing as a general rule the taking of real estate, as a security for an antecedent debt, provides that it can not be done under particular and exceptional circumstances. Nor is there anything in the statutes of the state (of Massachusetts), here considered, which in any way impairs the efficiency of national banks or frustrates the purposes for which they were created. *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85.

There is no conflict between the special power conferred by congress upon national banks to take real estate for certain purposes, and the general and indiscriminating law of the state of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in cases of insolvency. *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461,

17 S. Ct. 85. See *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

Dealings in real estate.—See post, "Property and Conveyances," § 259.

Contracts and dealings.—See post, "Contracts and Dealings in General," § 260.

Suits by and against bank.—See post, "Actions by or against National Banking Association," § 273.

23. Requiring transmission of lists of stockholders.—*Newman v. Wait*, 46 Vt. 689, affirmed in 94 U. S. 527, 24 L. Ed. 181.

24. Sale under execution of stock.—*Braden's Estate*, 165 Pa. 184, 30 Atl. 746.

25. Transferable quality of stock not subject to state control.—It is not competent for state legislation to limit or interfere with the transferable quality of national bank stock as the same is left by the statutes of the United States. *Doty v. First Nat. Bank*, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259.

26. Controlling receipt of deposits.—So far as Code Iowa, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks. *Judgment, State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389, reversed in 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288. See post, "Regulation and Supervision in General," § 235.

27. Power to punish crime.—"Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its

Place of Business and Filing Reports.—Banks created under the national banking act of the United States are not within a state law providing that "all corporations, except foreign insurance companies, formed under the laws of this or any other state," shall at all times have a place of business in the state, and that no corporation shall carry on any business in the state, till it shall have filed a statement giving the location of its officer and the name of its agent.²⁸

Regulation of Interest.—The power vested in congress to establish a bank, and to authorize it to lend money, includes the power to fix the rate of interest it may take, and to prescribe the penalties for taking a greater.²⁹ Hence a state usury law has no application to a national bank.³⁰

State Statute of Limitation.—The provisions of a state statute of limitations do not apply to the liability of directors of a national bank for violation of the national banking law, created by the federal law.³¹

§ 233 (3) Power of Comptroller and Bank Examiner.—The comptroller of the currency has no power to compromise or settle claims of a national bank against its debtors.³² Whether or not he may direct a discontinuance has been questioned but not decided.³³

own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288.

But a state can not make it a criminal act to receive a deposit while insolvent. *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288.

28. Place of business and filing reports.—*First Nat. Bank v. Commonwealth*, 17 Ky. L. Rep. 1167, 33 S. W. 1105.

29. Regulation of interest.—*First Nat. Bank v. Childs*, 133 Mass. 246.

It is within the constitutional power of congress to fix the rate of interest which a national bank may take upon a loan of money and to determine the penalty to be imposed for taking a greater rate, and such power, when exercised by congress, is exclusive of state legislation. *Central Nat. Bank v. Pratt*, 115 Mass. 539, 15 Am. Rep. 138; *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146.

Congress having prescribed the rate of interest which a national bank may charge and likewise the penalty for taking more than the rate allowed, the states are bound by the limitations thus prescribed both as to rate and the penalty. They can impose no penalty nor enforce any forfeiture beyond that fixed by congress; nor can they

apply remedies other than those given by the act declaring the forfeiture or the penalty. *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153. See post, "What Law Governs—Application of State Laws," § 270 (1).

30. State laws against usury.—The penalty imposed by § 5198, Rev. Stat., of the United States upon national banks for charging usury is exclusive; that law of this state, that a waiver of homestead when part of an usurious contract is void, imposes a penalty for charging usury, and is, therefore, not applicable to national banks. It follows that a surety who signs a promissory note containing a waiver of homestead and secretly tainted with usury, of which latter fact he had no knowledge at the time of signing, is not discharged from liability, when the note is payable to a national bank, as his risk has not been increased. *First Nat. Bank v. McEntire*, 112 Ga. 232, 37 S. E. 381. See post, "What Law Governs—Application of State Law," § 270 (1).

31. State statute of limitation.—*Welles v. Graves*, 41 Fed. 459.

32. Power of comptroller.—*Case v. Small*, 10 Fed. 722, 4 Woods 78.

33. Directing discontinuance of suit.—*Case v. Small*, 10 Fed. 722, 4 Woods 78.

§ 233 (4) National Bank Examiner.—A national bank examiner is not an officer or agent of the bank, and has no authority, as such, to act for the bank, and cannot bind it by any act done in its behalf.³⁴ He represents a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not, but it does none for them, other than to wind up their affairs for their creditors. The examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business.³⁵

§ 235. Regulation and Supervision in General.—The general power of the United States government and the state government to control and regulate national banks is treated in a preceding section.³⁶ And the supervision, regulation, and control of national banking associations in relation to their various business transactions and relations, will be found treated under the appropriate sections throughout this charter.

Reports Required.—The federal laws require national banks to make reports at stated intervals. As to the nature of the report to be made, what it shall exhibit, etc., reference must be had to the statutes.³⁷

Right of Visitation.—The states have no rights of visitation over national banks, except so far as such right may be vested in their courts of justice.³⁸

§ 236. Organization and Corporate Existence—§ 236 (1) In General—§ 236 (1a) Power to Create.—Congress alone has the power to create a system of national banks,³⁹ which it has exercised, not by

34. Bank examiner.—Witters v. Sowles, 32 Fed. 762.

35. Duties and authority of examiner.—Witters v. Sowles, 32 Fed. 762.

36. General power to control and regulate.—See ante, "Power to Control and Regulate," § 233.

37. Reports.—See U. S. Rev. Stat., § 5211.

38. Visitorial rights.—The right of visitation being a public right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, congress had in mind in passing § 5241, Rev. Stat. U. S. (providing: "No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are visited in the courts of justice"), that in other sections of the law it had made full and complete provision for investigation by the comptroller of the currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the

bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power. Guthrie v. Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

39. By congress alone.—Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307; Legal Tender Cases, 110 U. S. 421, 28 L. Ed. 204, 4 S. Ct. 122; Easton v. Iowa, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288.

The power of congress to establish national banks must be regarded by the judicial tribunals as settled by the repeated decisions of the supreme court of the United States. First Nat. Bank v. Garlinghouse, 22 O. St. 492, 10 Am. Rep. 751.

National banks are created by virtue

granting special charters but by authorizing the voluntary incorporation of associations under the general national banking act.⁴¹

§ 236 (1b) Articles of Agreement and Comptroller's Certificate.—Articles of Agreement.—Associations formed under the act to provide a national currency are required to enter into articles of agreement, specifying the object of the association; and the articles may contain other regulations, not inconsistent with the act, which the association may see fit to adopt for the conduct of their business and affairs.⁴²

Comptroller's Certificate of Organization.—The federal law authorizes the comptroller to issue a certificate to an association, lawfully entitled to commence business, that it has complied with all provisions required before commencing business and that it is authorized to commence business.⁴³

§ 236 (1c) Corporate Existence Necessary to Validity of Transactions.—No business, except such as is incidental and necessarily preliminary to its organization, can be transacted until it is authorized by the comptroller's certificate to begin business;⁴⁴ and the taking of a lease upon

of the banking laws of the United States. *Brooks v. State* (Tex. Civ. App.), 58 S. W. 1032, 1034.

A national banking corporation incorporated under and by virtue of the national banking laws has sufficiently complied with the statutory requirements and is duly incorporated. *Gill v. First Nat. Bank* (Tex. Civ. App.), 47 S. W. 751.

"The act of congress prescribes the condition upon which national banks shall be created; the powers they shall possess; and the consequences of their failure to meet their obligations. All persons dealing with these institutions only acquire and enforce rights against them under the limitations there designated." *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 612, 22 L. Ed. 687. See *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

"Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. *Bank v. Bank* (U. S.), 10 Wheat. 333, 347, 6 L. Ed. 334; *Ward v. Smith* (U. S.), 7 Wall. 447, 19 L. Ed. 207. The power of congress to

charter a bank is maintained in *McCulloch v. Maryland* (U. S.), 4 Wheat. 315, 4 L. Ed. 579, and in *Osborn v. United States Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government." *Legal Tender Cases*, 110 U. S. 421, 445, 28 L. Ed. 204, 4 S. Ct. 122.

"National banks were first created by the Act of 1863. 12 Stat. 665." *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

41. Under general laws.—*McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433.

42. Articles of agreement necessary.—*Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695; *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229.

The certificate shall specify, among other things, the amount of its capital stock, and the number of shares into which the same shall be divided, the names and places of residence of the shareholders, and the number of shares held by each. *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229.

43. Comptroller's certificate of organization.—See post, "Certificate of Comptroller," § 236 (2b).

44. Certificate essential to transaction of business.—"While by the earlier provisions of § 5136, Rev. Stat.,

a banking building is within the prohibition.⁴⁵ And whether such certi-

the association, upon filing its articles of association and its organization certificate with the comptroller of the currency, becomes 'as from the date of the execution of the organization certificate,' and 'for the period of twenty years from its organization,' a body corporate, with the usual powers of a banking corporation, yet, by the last clause of that section, congress has enacted that 'no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.'" *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

"By subsequent section of the National Bank Act, the comptroller is required to make a careful examination into the condition of the association; and, taking into consideration a full statement upon the oaths of the president and cashier, and of a majority of the directors, and any other facts which may come to his knowledge, by means of a special commission of inquiry, or otherwise, to ascertain and determine that at least fifty per cent. of the capital stock has been duly paid in, and that the association has in all other respects complied with the provisions of the National Bank Act, required to be complied with before commencing the business of banking; and thereupon, and not before, to make and to give to the association a certificate, under his hand and official seal, that the association has complied with all those provisions, and is authorized to commence the business of banking. Rev. Stat., §§ 5168, 5169. The comptroller, as this court has said, is 'clothed with jurisdiction to decide as to the completeness of the organization.' *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307; *Bushnell v. Leland*, 164 U. S. 684, 41 L. Ed. 598, 17 S. Ct. 209." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

"Until the association has been authorized by the comptroller to commence the business of banking § 5136 peremptorily forbids the corporation to 'transact any business' what-

ever, whether appertaining or not to the business of banking, except such as is incidental and necessarily preliminary to its organization.' The only business which it is permitted to transact is 'such as is incidental and necessarily preliminary,' not to carrying on, or even to commencing, the business of banking, but 'to its organization,' that it to say, such as is requisite to complete its organization as a corporation, which might doubtless include electing directors and officers, receiving subscriptions and payments for shares, procuring a corporate seal, and a book for recording its proceedings, temporarily hiring a room, and contracting any small debts incidental to the completion of its organization." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

Effect of transactions before organization.—Under Rev. St., § 5136, providing that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking, an arrangement made by the officers of a bank before the date of its certificate of authorization, providing for the cashing by another bank of checks drawn upon it, is invalid. *Armstrong v. Second Nat. Bank*, 38 Fed. 883.

45. Taking of lease within prohibition.—"To take a lease is certainly to 'transact business,' within the meaning of the statute; and a lease for a term of years, at a large rent, of offices to be occupied by the bank 'as a banking office, and for no other purpose,' however necessary it might be for the transacting, or even for the commencing, of banking business by a corporation whose organization had been completed, and which had been lawfully authorized to commence the business of banking, is in no sense incidental or necessarily preliminary to the organization of the corporation." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

"The provision of § 5190, that 'the usual business of each national banking association shall be transacted at

cate has issued, or not, is a matter of public record, of which every one is presumed to have notice.⁴⁶

§ 236 (1d) Time Limit.—National banks continue for twenty years, unless sooner dissolved, or their franchises forfeited.⁴⁷

§ 236 (1e) Corporate Existence Continued after Time Limit.—A national bank, after expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs are completely settled.⁴⁸

Comptroller's Certificate Extending Corporate Existence.—Where a national bank continues its existence and performs the functions of such an association after the expiration of its original corporate existence for a long period of time, it will be presumed to have accepted the benefit of a certificate executed by the comptroller of a currency extending its corporate existence.⁴⁹

§ 236 (2) Evidence of Corporate Existence—§ 236 (2a) In General.—It seems that the corporate existence of a national bank must

an office or banking house located in the place specified in its organization certificate,' refers to its 'usual business,' after obtaining the certificate from the comptroller; and to 'the place,' that is, the city or town, in which, after it has been authorized by the comptroller's certificate to commence its business of banking, its 'office or banking house' is located." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

46. As matter of record.—"The result of the comptroller's examination, and his certificate of that result, and of the authority thereupon granted the corporation to commence the business of banking, of course appear on the records of his office, as do the articles of association and the organization certificate previously transmitted to him. Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record, upon which, by the very terms of the National Bank Act, depend the right of the association to exist as a corporation, and its capacity to transact business." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

"The comptroller's examination and certificate are required, not only for the security of those dealing with the

bank, but also for the protection of the stockholders, for, without them, stockholders who had paid in the amount of their subscriptions might find themselves held liable for debts contracted by the corporation, without its having obtained the payments due from other stockholders, and otherwise complied with the requirements of the act." *McCormick v. Market Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328.

47. Duration.—"Associations for banking, formed pursuant to the act to provide a national currency, and duly authorized by the comptroller of the currency to commence the business of banking, become bodies corporate and have a succession for the period of twenty years from their organization, unless sooner dissolved according to the provisions of their articles of association, or by the act of the shareholders owning two-thirds of the stock, or unless the franchise shall be forfeited by a violation of the act under which the association was formed." *First Nat. Bank v. National Pahquoque Bank (U. S.)*, 14 Wall. 383, 20 L. Ed. 840.

48. Corporate existence.—*Farmers' Nat. Bank v. Backus*, 74 Minn. 264, 77 N. W. 142.

49. Effect of comptroller's certificate extending corporate existence.—*Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

be proved unless the statute has dispensed with such proof.⁵⁰ But it is held that it will be assumed that a bank entitling itself a "national bank" was duly organized as such.⁵¹ The act of congress, prescribing a mode of proving the organization of national banks, is not in derogation of any state law.⁵²

United States Bank.—In a suit by a United States bank, an exemplification of the charter must be produced to prove the corporation.⁵³

§ 236 (2b) Certificate of Comptroller—§ 236 (2ba) In General.—The federal law authorizes the comptroller to issue a certificate to an association lawfully entitled to commence business, that it has complied with all provisions required before commencing business, and that it is authorized to commence business, and such certificate is conclusive evidence of the incorporation of the association to which it is issued.⁵⁴ Such certificate sustains an inference that the bank was duly organized, in the absence of proof that the certificate referred to another bank by the same name and at the same place.⁵⁵ A certificate given by one as "acting" comp-

50. In absence of statutory provision covering question.—Before Code Civ. Proc., § 1776, took effect, a national bank was not within 2 Rev. St. 458, § 3 (Amend. 1864, c. 422), dispensing with proof of corporate existence unless denied in the answer. *New York Exch. Bank v. Jones* (N. Y.), 9 Daly 248.

51. Organization assumed.—*Slaughter v. First Nat. Bank*, 109 Ala. 157, 19 So. 430.

52. Act of congress prescribing mode of proof.—*First Nat. Bank v. Randall*, 1 Tex. App. Civ. Cases, § 971.

53. United States Bank—Exemplification of charter.—*United States Bank v. Stearns* (N. Y.), 15 Wend. 314.

54. Comptroller's certificate—In general.—*Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1, 82 N. W. 186; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307; *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

A certificate given under date of May 14, 1877, by the deputy comptroller of the currency, as "acting" comptroller of the currency, meets the requirements of the statute, requiring a certificate that the provisions of the statute relating to such associations had been complied with, and that it was authorized to commence the business of banking. This point was not specifically made in the court below, but there is nothing of substance in it, even if it could properly be raised in this collateral proceeding. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

This court takes judicial notice of the fact that he was, at the date of his certificate, deputy comptroller of the currency. And it will be assumed that, at the date of his certificate, he was authorized to exercise the powers and discharge the duties of the comptroller, and was therefore, at the time, acting comptroller. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

The certificate of organization of a national bank, issued by the comptroller of the currency, is competent evidence of the incorporation of the bank. *National Bank v. Galland*, 14 Wash. 502, 45 Pac. 35.

Plea of nul tiel corporation.—In a suit by a national bank, as indorsee, upon a note, under the issue upon a plea of nul tiel corporation, the certificate of the comptroller of the currency, issued under Rev. St. U. S., § 5169, that such association had complied with the law, etc., was admissible in evidence. *Mix v. National Bank*, 91 Ill. 20, 33 Am. Rep. 44.

In prosecution of officer for violating banking act.—The denial of an application by accused for a continuance will not be reviewed on a writ of error, in the absence of a showing that the trial court's discretion was abused. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

55. As warranting inference of organization.—A comptroller's certificate of the due organization of "the Washington County National Bank of Greenwich, in the county of Washington and state of New York"—held, in the absence of proof that there was

troller is efficacious for the same purpose.⁵⁶

Certificate with Other Evidence.—A copy of the certificate of the organization of a national bank, certified by the comptroller of the currency, as required by the national banking act of congress, and the certificate of the comptroller authorizing it to commence business, together with other facts,⁵⁷ such as the testimony of a bookkeeper of another bank that such bank had done a regular banking business tending to show that it had acted as a corporation under the certificate is sufficient to show that such bank is a de facto banking corporation.⁵⁸ A copy of the organization and certificate of a national bank, duly certified by the comptroller of currency of the United States, and authenticated by his official seal, and the deposition of the cashier of said bank, is sufficient evidence of its corporate existence.⁵⁹

Reorganization of State Bank as National Bank.—No authority other than that conferred by congress is required to enable a bank existing under a special or a general state law to become a national banking association. The certificate of the comptroller is conclusive as to the completeness of the organization under the act of congress in a suit against a stockholder to enforce his liability, or a party upon his contract with the bank.⁶⁰

Savings Bank Converted to National Bank.—The certificate of the comptroller of the currency is conclusive as to the regularity of the proceedings by which a savings bank has been converted into a national bank.⁶¹

§ 236 (2bb) Admissibility of Certificate.—It is no objection to the admission in evidence of the certificate of the organization of a national bank that the notary before whom it was acknowledged appears to be one of the shareholders of the bank. The comptroller's certificate of compliance with the act of congress removes any objection which might otherwise have been made to the evidence on which he acted.⁶²

any other bank at Greenwich so named, to warrant an inference that the plaintiff bank was duly organized, although describing itself in its declaration as "the Washington County National Bank, a corporation duly established by law, and doing business in Greenwich," etc. *Washington County Nat. Bank v. Lee*, 112 Mass. 521.

56. Certificate by "acting" comptroller.—It is no objection to a certificate issuing from the office of the comptroller of the currency, and under the seal of that office, that it was given by L. as "acting" comptroller, and that such office was unknown to the law, as a deputy comptroller is provided for by Rev. St. U. S., §§ 178, 327, to act during the absence or inability of the comptroller, and the court will take judicial notice that L. was deputy comptroller, and will presume that he

was authorized at the date of the certificate to act for the comptroller. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290, cited in *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305, on this point.

57. Certificate or copy thereof with other evidence.—*Merchants, etc., Bank v. Cardoza*, 35 N. Y. Super. Ct. 162.

58. Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97.

59. Evidence of corporate existence.—*Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 So. 42.

60. Reorganization of state bank.—*Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

61. Conversion of savings bank.—*Keyser v. Hitz*, 2 Mackey (13 D. C.) 473.

62. Admissibility of certificate.—*Thatcher v. West River Bank*, 19 Mich. 196.

Authority of Certificate.—When the seal of the comptroller is impressed upon a certificate, the court will take judicial notice of its authenticity. It is in daily use authenticating many of the most important financial transactions of the executive department of the government.⁶³ And where the association does a banking business, in pursuance to the certificate, under the supervision of the comptroller, it adds to and affords full recognition to the authenticity of the certificate.⁶⁴

Necessity for Physical Acceptance by Bank of Certificate.—An objection to the introduction of the certificate because it is not shown to have been physically accepted or received by the bank will not be sustained, where the bank continued its existence, performing the functions of a national bank, after the expiration of its original corporate existence. It will be presumed to have accepted the benefit conferred by the certificate in its favor, and to have acted under the authority of the only instrument which entitled it to act at all.⁶⁵

§ 236 (2c) Parol Evidence as to Engaging in General Bank Business.—In an action by a national bank plaintiff may prove that it is a corporation de facto by parol evidence, that it is carrying on a general banking business as a national bank authorized by the general laws of the United States, under the name by which it has sued; the court taking judicial notice of such laws.⁶⁶

§ 236 (3) Estoppel to Deny Corporate Existence.—In a suit by a receiver to enforce the liability of the stockholders of a national bank, the stockholder is estopped from denying the existence or the validity of the corporation.⁶⁷ In an action by a national bank on a draft discounted for defendant, the latter may deny plaintiff's existence as a corporation.⁶⁸

§ 236 (4) Collateral Impeachment of Organization.—The organization of a national bank cannot be impeached collaterally, but its dissolution must be enforced according to the national banking law.⁶⁹

§ 237. Reorganization of State Banks as National Banks.—No authority other than that conferred by congress is required to enable a bank

63. **Authenticity of certificate.**—*Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305, citing *Pierce v. Indseth*, 106 U. S. 546, 27 L. Ed. 254, 1 S. Ct. 418, for analogous case.

64. **Other acts adding to authenticity.**—*Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

65. **Necessity for physical acceptance by bank of certificate.**—*Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

66. **Parol evidence as to engaging in general bank business.**—*Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

67. **Estoppel to deny corporate existence.**—*Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

A shareholder in a national bank, when called upon to respond to his liability as such, can not question the legal existence of the bank. *Keyser v. Hitz*, 2 Mackey (13 D. C.) 473.

68. **Right of defendant selling note to bank to deny existence.**—*Bank v. Orcutt* (N. Y.), 48 Barb. 256.

69. **Collateral impeachment of organization.**—*Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531. See post, "Forfeiture of Franchise and Dissolution," § 284.

existing under a special or a general state law to become a national banking association.⁷⁰ Any bank incorporated by special law, or any banking institution organized under a general state law, may become a national bank, and this includes savings banks organized in the District of Columbia.⁷¹ And a new issue of certificates of stock is not essential.⁷²

Mode and Effect of Change.—Congress intended to encourage the conversion of state banks into national banks. To further this intent, it provided an easy mode of effecting the change without materially interrupting the business of the bank.⁷³ The law provides that such banks may become

70. Authority for reorganization as national banks.—*Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

Act March 3, 1865, c. 78, § 14, 13 Stat. 486, providing for the conversion of state banks, into national banks, was carried into the Revised Statutes as §§ 3410, 3411 (U. S. Comp. St. 1901, p. 2248). As printed in those sections they are misleading. They should be construed together as one sentence, connected by the conjunction "and," as in the original acts. *Merchants' Nat. Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979.

71. What may be reorganized.—The privilege of becoming a national banking association is given by § 5154, Rev. Stat., to "any bank incorporated by special law, or any banking institution organized under a general law of any state." These words, it is argued, do not embrace savings banks organized in the District of Columbia, and only refer to banks or banking institutions created under the authority of some state, either by a special or general law. But all difficulty upon the subject is removed by the act of congress, entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, 19 Stat. 63, c. 156. Under that act the German-American Savings Bank was required to make to the comptroller of the currency the reports which by §§ 5211, 5212, 5213, Rev. Stat., were required from national banking associations. It also became subject to all the provisions of the Revised Statutes and of the acts of congress relating to national banking associations, so far as those provisions were applicable to a savings banks organized in this district. It is too clear for dispute that, after the passage of the Act of 1876, savings banks organized in this district under an act of congress, and having a capital stock paid up in whole or in part, were entitled to become

national banking associations in the mode, and subject to the conditions, prescribed by § 5154. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

Rev. St. U. S., § 5154 gives the privilege of becoming a national banking association to "any bank incorporated by special law, or any banking institution organized under a general law of any state." Act Cong. June 30, 1876, provides that all savings or other banks organized in the District of Columbia under any act of congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and to all acts of congress applicable to national banking associations, as far as the same may be applicable to such savings or other banks. Held, that savings banks so organized in the District of Columbia are entitled to become national banking associations in the mode prescribed in § 5154. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

Savings bank—Extent of capital.—Under Act U. S. June 30, 1877, a savings bank in the District of Columbia might be converted into a national bank, although its capital was less than \$100,000. *Keyser v. Hitz*, 2 Mackey (13 D. C.) 473.

72. New certificates of stock unnecessary.—Where a national bank is formed from an established bank of another description, a shareholder therein cannot escape liability by reason of the fact, if such be the fact, that no certificates were issued to him by the new national bank. The statute expressly declares that the shares of the old bank may continue to be for the same amount each as they were before the conversion. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

73. Easy mode of effecting changes.—*Bank v. McIntire*, 40 O. St. 528.

national banks upon certificate of a majority of the directors of any such bank showing that the owners of two-thirds of its capital stock had authorized them to make the certificate and convert the institution into a national bank.⁷⁴ When a state bank under special charter is authorized by its charter to issue, in addition to its regular voting stock, nontransferable stock, the holders of which have no power of voting, a majority of the voting stockholders have the right, in the absence of state legislation, to change it to a national bank, and transfer the whole institution, capital and assets, including nontransferable stock, to the new corporation.⁷⁵

Effect of Reorganization.—The conversion of a bank, organized under the territorial law, into a national bank transfers the assets of the former to the latter, which succeeds thereto by operation of law, and not as a purchaser.⁷⁶ It has been held that when a state bank is converted into a national bank, there is no actual transfer of property from one bank to another, but a continuation of the same under a changed jurisdiction.⁷⁷ When the mode of reorganization provided by congress is adopted, the national bank becomes the owner of all of the assets of its predecessor, the state bank, of whatever nature.⁷⁸ But where this method is not followed, and a national bank is in fact organized as the successor of a state bank with the consent of more than two-thirds of the stockholders, it may nevertheless hold and own assets of its predecessor, although in form it was organized as a new bank, and the assets were transferred to it as if by sale and purchase.⁷⁹

Effect as Officers, Directors, etc.—As to the holding over of the old directors and the election of new ones, their oaths, etc., see post, "Election or Appointment of Officers," § 251.

Rights of Original Stockholders—Right to Become Stockholders.—The Act of 1863 authorized a majority of voting stockholders of any state bank to elect to become a national bank, under the Act of Congress of June 2, 1864, and impliedly provided that such election would cut off all rights of nonvoting stockholders except that of receiving from the assets of the old institution (continued three years for winding up its affairs) the value of their stock.⁸⁰ The Act of 1864 provided for a similar election, which should operate merely as suspension of the charter while the national law remained in force, and gave nonvoting stockholders the right,

74. *State v. Phoenix Bank*, 34 Conn. 205.

75. **Voting stock—What constitutes two-thirds.**—*State v. Phoenix Bank*, 34 Conn. 205.

76. **Effect of reorganization.**—*Peoples Bank v. Board (Okl.)*, 103 Pac. 682, affirmed in 104 Pac. 55.

77. **No actual transfer.**—*Aldrich v. Bingham*, 131 Fed. 363.

78. **Right to hold assets of prede-**

cessor.—In *Bank v. McIntire*, 40 O. St. 528, it was held that a national bank, in fact organized as the successor of a state bank, may hold the assets of its predecessor even though in form it was organized as a new bank.

79. **Reorganization by consent of stockholders.**—*Bank v. McIntire*, 40 O. St. 528.

80. **Right of stockholders—Act of 1863.**—*State v. Phoenix Bank*, 34 Conn. 205.

upon certain conditions, to elect and become stockholders in the national bank, and left it optional with voting stockholders to accept its provisions, or act without regard to them, under the Act of 1863.⁸¹ But where the law provides that such election shall suspend its charter during the existence of the national law, and that nonvoting stockholders shall be included as stockholders in the new corporation, if they, within a prescribed time from receipt of notice required by statute from the bank of its election, give written notice of their desire to be so included, if an election is made without pursuing strictly and technically the provision of the act, the new institution cannot exclude from becoming stockholders nonvoting stockholders of the old corporation on the ground that they have not complied technically with the act.⁸² The new corporation may waive the requirements of the statute and permit the nonvoting stockholders to come in without complying therewith.⁸³ And if the failure of the stockholder to give the required notice is waived by the bank, such failure does not forfeit the stockholder's rights.⁸⁴

Payment for Shares of Stock.—Where the law authorizes the voting stockholders of any state bank to elect to convert the bank to a national

81. *State v. Phoenix Bank*, 34 Conn. 205.

Held, where the voting stockholders elected to act under Act 1863 absolutely, the nonvoting stockholders had no right to elect to become stockholders in the national bank. *State v. Phoenix Bank*, 34 Conn. 205.

Act Cong. June 3, 1864, which created national banks, authorized state banks incorporated under special or general law to become national banks, upon certificate of a majority of the directors of any such bank showing that the owners of two-thirds of its capital stock authorized them to make the certificate, and convert it into a national bank. Act 1863 authorized the voting stockholders of any state bank to elect to convert the bank into a national bank, such election to be deemed a surrender of the state charter, providing that the bank should be continued for three years for winding up its affairs, and that any stockholder refusing to become a stockholder of the national bank should be paid the duly appraised value of the stock held by him. Held, that where a state bank, under authority of its special charter, had issued, in addition to its regular or voting stock, non-transferable stock, the holders of which had no power of voting, an election, by a majority of the voting stockholders, to convert the bank into a national bank, divested the nonvoting stockholders of all their rights

except the right to receive from the assets of the old bank the value of their stock. *State v. Phoenix Bank*, 34 Conn. 205.

82. **Nonvoting stockholders not excluded.**—*State v. Hartford Nat. Bank*, 34 Conn. 240.

83. **Waiver of requirements of statute.**—Where an election was made, and nonvoting stockholders of the old corporation included as stockholders of the new in its certificate of organization, without ascertaining, in the mode provided by the statute, whether they assented to become stockholders, the assumption that they had so elected, so far as it was for the benefit of such stockholders, was a waiver by the new corporation of the provisions of the statute prescribing the method in which an election should be made. *State v. Hartford Nat. Bank*, 34 Conn. 240.

84. **Waiver of required notice.**—Where the state was a nonvoting stockholder, and the bank solicited the assent of the state treasurer to the state becoming a stockholder in the new corporation, and, acting upon the knowledge that he intended to assent, included the state as a stockholder of the new corporation, and published the certificate, the failure of the state treasurer to give notice that the state desired to become a stockholder, the notice being by the acts of the bank waived, did not forfeit its right. *State v. Hartford Nat. Bank*, 34 Conn. 240.

bank, such election to be deemed a surrender of the state charter, providing that the bank be continued for three years for winding up its affairs, and that any stockholder who refuses to become a stockholder in the national bank be paid the duly-appraised value of his stock, where a state bank, under authority of its special charter, had issued, in addition to its regular or voting stock, nontransferable or nonvoting stock, nonvoting stockholders, on election of a majority of the voting stockholders to become a national bank, are entitled to a full share of the assets, and can not be compelled to accept the par value of their stock, with interest.⁸⁵

Evidence of Conversion and Reorganization.—See ante, "Certificate of Comptroller," § 236 (2b).

Estoppel to Deny Assent to Reorganization.—A stockholder may be estopped to deny his liability for assessments levied on such stock by the comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank.⁸⁶ Thus, where a stockholder in a state bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend checks made payable by the bank to the order of such children, he was estopped.⁸⁷

§ 238. Name.—The act which authorizes a state banking institution to become a banking association under the laws of the United States provides "that said bank may continue to use its corporate name for the purpose of prosecuting and defending suits," and simply confers a privilege which does not conflict with the act of congress requiring national banks to have a corporate name.⁸⁸

§ 239. Location and Place of Business.⁸⁹—The law provides that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."⁹⁰ And a national bank can not make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank.⁹¹

^{85.} **Payment for shares of stock.**—*State v. Phoenix Bank*, 34 Conn. 205.

^{86.} **Estoppel to deny assent.**—*Aldrich v. Bingham*, 131 Fed. 363.

"Section 5154, Rev. Stat. [U. S. Comp. St. 1901, p. 3466], clearly points out the way in which a state bank may become a national bank, and a shareholder who is called upon by the comptroller to respond to his liability as a shareholder is not permitted to deny the existence of the legal existence or validity of such corporation." *Aldrich v. Bingham*, 131 Fed. 363, citing *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

^{87.} **What constitutes estoppel.**—*Aldrich v. Bingham*, 131 Fed. 363.

^{88.} **Corporate name—Reorganized state banks.**—*Thomas v. Farmers' Bank*, 46 Md. 43. See ante, "Name," § 31.

^{89.} **Bank of United States—Locality of operations.**—See ante, "Place of Exercise," § 86 (3).

^{90.} **Place of business.**—*Armstrong v. Second Nat. Bank*, 38 Fed. 883. See ante, "Location and Place of Business," § 32. As to branch banks, see ante, "Branches," § 33.

^{91.} **Contract for cashing check at another bank.**—*Armstrong v. Second Nat. Bank*, 38 Fed. 883.

Designation of Place in Certificate.—The provision of law requiring an association formed for the purpose of conducting a national bank to designate in its organization certificate "the place where its operations of discount and deposits are to be carried on," refers to the town or city and not the office or building.⁹²

§ 240. By-Laws.—The law authorizes national banks to incorporate in their articles of association any provision, not inconsistent with the act, for the regulation of the business of the bank.⁹³ The articles of association generally make provisions for the making of by-laws necessary for the regulation and management of the business.⁹⁴ Such power is usually put in the hands of the directors.⁹⁵

By-Laws Regulating Transfer of Stock.—The law governing national banks provides that the transfer of the stock of the association shall be regulated by by-laws.⁹⁶ For a treatment of the validity of by-laws regulating the transfer of shares of stock, see post, "Transfer of Stock," § 232; "Lien of Bank on Stock," § 245.

Election or Appointment of Officers.—As to by-laws regulating the appointment and election of officers, see post, "Election or Appointment of Officers," § 251.

§ 241. Capital and Shares⁹⁷—§ 241 (1) Definitions and Nature.—The capital stock of a national bank is the sum on which it is authorized to do business, constituting the permanent basis of its credit, and does not include the deposits of the bank.⁹⁸

Shares of stock in national banks are personal property, and although a share may be in itself intangible, it represents that which is tangible. It represents money or property invested in the capital stock of the bank,⁹⁹ but shares of the national banks, while they constitute the capital stock of the corporation, do not represent the whole amount of the capital actually employed by them.¹

What Law Protects Stock and Shareholder.—The capital is employed in business by the bank, and the business is very likely carried on

92. Designation of place in certificate.—*McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381, affirming 61 Ill. App. 33.

93. What by-laws may be made.—*Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429.

94. Provision in articles of association.—*Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429. See ante, "Constitution and By-Laws," § 34.

95. Power given to directors.—*Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429.

96. Transfer of stock.—*Young v. Vough*, 23 N. J. Eq. 325, affirmed in 24 N. J. Eq. 535.

97. Evidence of increase or reduction in action to enforce stockholder's liability, see post, "Evidence," § 250 (5).

Purchase by bank of its own stock, or loaning money on security thereof, see post, "Purchase by Bank of Its Own Stock or Loaning Money on Security Thereof," § 260 (3).

98. Capital stock.—*State v. Clement Nat. Bank (Vt.)*, 78 Atl. 944.

99. National bank shares.—*Tappan v. Merchants' Nat. Bank (U. S.)*, 19 Wall. 490, 22 L. Ed. 189.

1. National Bank v. Boston, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts its business.²

§ 241 (2) Increase of Capital Stock—§ 241 (2a) Requisites and Validity—§ 241 (2aa) In General.—National banks can increase their capital stock only as provided by Rev. St., § 5142, and the Act of Congress of May 6, 1886. On looking at the terms of § 5142 of the Revised Statutes, it appears that three things must occur to constitute a valid increase of the capital stock of a national banking association: First, That the association, in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; second, That the whole amount of the proposed increase shall be paid in as part of the capital of such association; and third, that the comptroller of the currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment.³

§ 241 (2ab) Assent of Stockholders.—To constitute a valid increase of the capital stock of a bank it is essential that the consent of the association be obtained as provided by its articles. Where an increase of the capital stock of a national bank is attempted to be made without obtaining the consent of its stockholders as provided for by the articles of association, the proceedings are invalid,⁴ and preliminary subscriptions to such increase cannot be enforced.⁵

Resolution of Stockholders as Estoppel.—The effect of a resolution of the shareholders of a national banking association, proposing to increase the capital stock from \$200,000 to \$500,000, and authorizing the president and cashier, whenever \$50,000 of the increase was subscribed and paid, to certify the same to the comptroller, was to render valid and binding on the subscribers, when paid and approved by the comptroller, any increase amounting to \$50,000, or any multiple thereof, not exceeding \$300,000 in all.⁶ One who subscribes to a proposed increase of stock with knowledge that the stockholders had by a resolution authorized the officers, with the

2. Law which protects stock and shareholder.—*Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

3. Steps essential to valid increase.—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

National banks can increase their capital stock only as provided by Rev. St., § 5142, and Act Cong. May 6, 1886; and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase, and the certificate and approval of the comptroller of the cur-

rency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase can not be enforced. *Winters v. Armstrong*, 37 Fed. 508.

4. Assent of stockholders.—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Winters v. Armstrong*, 37 Fed. 508; *Schierenberg v. Stephens*, 32 Mo. App. 314; *Nichols v. Stephens*, 32 Mo. App. 330.

5. *Winters v. Armstrong*, 37 Fed. 508.

6. Resolution of stockholders as estoppel.—*Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

approval of the comptroller, to increase the capital stock in any multiple of \$50,000 up to \$300,000, as the subscriptions shall be paid in, is estopped from questioning the regularity of the proceedings after the certificate of the comptroller to such an increase is obtained.⁷

§ 241 (2ac) Payment in Full of Whole Amount of Subscription—

§ 241 (2aca) In General.—To constitute a valid increase of the capital stock of a national bank, it is essential that the whole amount of the proposed increase shall be paid in as part of the capital stock of such association.⁸ The provision of Rev. St., § 5142, to the effect that no increase of the stock of a national bank shall be valid until the whole amount thereof is paid in, does not create a condition which renders shares subscribed and paid for in full invalid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid up in full to render it valid; the amount of the proposed increase approved by the comptroller merely fixing the maximum amount within which any increase, if paid up, will be valid.⁹

§ 241 (2acb) Reduction of Amount of Proposed Increase.—Where a national bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount actually paid; the amount of increase within the maximum being always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the comptroller of the currency.¹⁰ The provision of Rev. St., § 5142, that “no increase of capital stock shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate ob-

7. *Matthews v. Columbia Nat. Bank*, 79 Fed. 558, reversed in 29 C. C. A. 491, 85 Fed. 934.

8. **Payment in full of whole amount of subscription.**—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417; *Winters v. Armstrong*, 37 Fed. 508.

Section 5142, Rev. Stat., would be violated by an issue of \$500,000 of new stock, when only \$461,300 was paid in. The section in question was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

9. *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

10. **Reduction of amount of proposed increase.**—*Delano v. Butler*, 118 U. S.

634, 30 L. Ed. 260, 7 S. Ct. 39; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National, etc., Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *Mills v. Butler*, 118 U. S. 655, 30 L. Ed. 266.

Where a subscription to a part of the increased stock of a national bank has become complete and binding, under the terms of the original resolution of increase, its validity is not affected by any subsequent action looking to a limitation of the increase authorized. *Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

tained specifying the amount," is not violated where the proposed increase is reduced to the amount actually paid in, and the latter is the amount of increase specified in the notice.¹¹

Rights and Liabilities of Subscribers.—The position of a subscriber for a part of a proposed increase in the capital stock of a national bank, who pays and receives a receipt therefor, and is entered on the books as a stockholder, but whose certificate was not delivered to him, was not affected by the fact that subsequently thereto, by due proceedings, but unknown to him, the amount of the proposed increase was reduced.¹² Where a person subscribes to a certain proposed increase of stock of a national bank, and pays his subscription, he is bound thereby, though the bank, under the provisions of its by-laws to "determine what disposition shall be made of the privilege of subscribing for the new stock" when it has not all been subscribed for within the time given in its notice, limits the amount of the increase to the amount paid in.¹³ There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances.¹⁴

§ 241 (2acc) Waiver of Right to Insist upon Payment of Full Amount.—The acceptance by a subscriber to a proposed increase of the capital stock of a national bank of the stock and payment of the subscription, with the knowledge of the fact that the bank with the consent of the comptroller has reduced the amount of the proposed increase, is a waiver of any right to insist on the full amount being taken,¹⁵ and the payment of

11. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

12. **Rights and liabilities of subscriber.**—*Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987, reversing 144 Mass. 260, 10 N. E. 844.

The filing of the amount of additional stock was not a condition of the liability of the subscribers to the new stock, but the association always retained the power of reducing the amount of stock, with the approval of the comptroller of the currency. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985.

13. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

14. **Interference by equity.**—It could hardly be contended that a case in which more than ninety-two per cent of the contemplated increase of capital

was actually subscribed and paid in, would belong to that category. "In *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47, only \$320,000 out of \$500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations." *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

15. **Waiver.**—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985; *Herhold v. Upton*, 154 U. S. 624, 23 L. Ed. 892, 14 S. Ct. 1203.

"The principles decided in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, and *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384, are conclusive of this case. The judgment of the circuit court is, therefore, affirmed upon the

a voluntary assessment to restore impaired capital is such a waiver.¹⁶

§ 241 (2ad) Approval and Certificate of Comptroller.—To constitute a valid increase of the capital stock of a national bank, it is essential that the comptroller of the currency shall issue a certificate approving the same, and certifying that the amount thereof has been paid in,¹⁷ and

authority of those cases. If the stock held by—is part of the increased capital, he is estopped by his acceptance of the certificate from denying the regularity of the proceedings under which the increase was affected. If it is part of the original stock, his liability exists whether the increase was made or not. In either event the testimony offered to show that he did not sign the assent to the increase of the capital stock, filed with the auditor of public accounts, was immaterial and properly excluded.” *Herhold v. Upton*, 154 U. S. 624, 23 L. Ed. 892, 14 S. Ct. 1203.

Where a stockholder paid for his shares and accepted his certificate, in legal contemplation, with knowledge of the law which authorized the association and the comptroller of the currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, such payment and acceptance of certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

Where the new stock was created in a regular manner by the board of directors, who had authority for that purpose; it was subscribed and actually paid in by the stockholders; it was certified to the comptroller of the currency, and approved by him; and it was reported to the meeting of stockholders and approved by them, as their almost unanimous vote for an assessment shows, an objection to the validity of the increased capital, that it did not equal the amount first voted for by the directors, where as reduced, it had the sanction of the directors, the approval of the comptroller of the currency, and the assent of the stockholders at their meeting on the 10th of January, 1882, is not a valid one. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

There was no express condition that the individual subscriptions should be void if the whole \$500,000 was not sub-

scribed; and there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779, 10 S. Ct. 417.

And the same principle applies where the stock was paid for, though no certificate was taken out. The money paid can not be recovered back, after demand therefor upon the bank. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985. See, also, *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

16. Payment of voluntary assessment.—Where a shareholder of a national bank subscribes to a certain increase of stock, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, by paying on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in Rev. St., § 5205. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Mills v. Butler*, 118 U. S. 655, 30 L. Ed. 266.

His payment was voluntary; it was made either with actual knowledge of the facts, or with such opportunity and means of knowledge as, by the exercise of common diligence, would have made him acquainted with the facts, and the payment made upon a distinct consideration, whereby the bank in which he was interested was enabled to undertake anew its regular and active business. It amounts to a ratification of the action of the association, and of the comptroller in fixing the amount of increase of stock at the less sum. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

17. Approval and certificate of comptroller.—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Winters v. Armstrong*, 37 Fed. 508.

where an increase is attempted to be made without obtaining the certificate and approval of the comptroller, the proceedings are invalid,¹⁸ and preliminary subscriptions to such increase cannot be enforced.

Effect of Certificate.—The action of the comptroller of the currency in issuing a certificate approving an increase of the capital stock of a national bank¹⁹ and certifying that the amount thereof has been paid in,²⁰ is that of a special tribunal,²¹ is conclusive, and not subject to collateral attack;²² and a suit by a subscriber to such stock against a receiver of the bank after its insolvency, for the recovery of his subscription, on the ground that the increase was illegal, and the comptroller's certificate void, is such an attack.²³

18. Plaintiffs subscribed for certain shares in a bank to increase the capital, and, after paying installments thereon, consented that the bank be consolidated with a national bank, and that the capital of the latter be increased, and that their subscriptions should stand as subscriptions to the increased capital of the national bank, and paid installments on their subscriptions. Some preliminary steps were taken by the national bank to increase its stock, but the comptroller of the currency refused to consent to the full increase, and before the amount of increase allowed by him was paid in, and a certificate therefor issued by him, the national bank was placed in the hands of a receiver. Held, that plaintiffs never became stockholders in the national bank. *McFarlin v. First Nat. Bank*, 16 C. C. A. 46, 68 Fed. 868.

A national bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before January 1, 1872, and a semi-annual dividend declared as of that day was paid on the new shares as well as the old, but such increase of capital was not approved by the comptroller of the currency nor his certificate issued until January 5, 1872. Held, that the new shares were not subject to taxation under an ordinance imposing a tax on bank shares "in the hands of the taxpayers on January 1, 1872," as there could be no valid increase of the capital stock of a national bank until the comptroller of the currency approved thereof and issued his certificate, as provided by § 13 of the act of congress relating to the organization of national banks. *Charleston v. People's Nat. Bank*, 5 S. C. 103, 22 Am. Rep. 1.

19. **Effect of certificate.**—*Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

20. *Latimer v. Bard*, 76 Fed. 536.

21. *Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

22. **Collateral attack.**—*Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

The action of the comptroller of the currency in approving of an increase in the capital of a national bank, and certifying that the amount thereof has been paid in, is conclusive, and the validity of the increase can not be collaterally assailed. *Latimer v. Bard*, 76 Fed. 536.

The certificate of the comptroller of the currency, approving an increase of the capital stock of a national bank, is conclusive of the existence of the facts authorizing such certificate, and a subscriber to the stock can not question its validity. *Tillinghast v. Bailey*, 86 Fed. 46, affirmed in 40 C. C. A. 93, 99 Fed. 801.

The comptroller's certificate, authorizing an increase of the capital stock of a national bank, is conclusive of the existence of all the facts necessary to authorize such increase in favor of the public and against the subscribers to such stock. *Decree, Tillinghast v. Bailey*, 86 Fed. 46, affirmed in 40 C. C. A. 93, 99 Fed. 801.

The certificate of the comptroller of the currency that the capital stock of a bank has been increased to a certain amount is conclusive of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and can not be questioned in any collateral proceeding. Judgment, *Matthews v. Columbia Nat. Bank*, 79 Fed. 558, reversed in 29 C. C. A. 491, 85 Fed. 934.

23. **Suit by subscriber against receiver.**—*Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326.

§ 241 (2ae) Delivery of Certificate of Stock.—Where a subscriber for a proposed increase in the capital stock of a national bank pays and receives a receipt therefor, and is entered on the stock books as a stockholder,²⁴ he becomes a stockholder, though his certificate of stock, which was made out for him when he should call for it, was not called for or sent to him.²⁵

§ 241 (2b) Recovery Back of Payment Where Increase Fails.—Where there is a noncompliance with the statutory requirements necessary to make an increase of stock valid, a subscriber who has made payments on his subscription to the proposed increase, believing that such requirements would be complied with,²⁶ is, upon the insolvency of the bank, entitled to be treated as a creditor to the amount paid in by him,²⁷ and to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands,²⁸ or to have such amount set off pro tanto against a note held against him.²⁹

Right of Vice President of Bank.—The vice president of a national bank, having procured an issue to himself of certificates of paid-up stock, was in no position, when the bank became insolvent, before the necessary steps to legitimate the increase of stock had been taken, to demand back his money, as if it were trust money, or constituted a preferred claim against the assets of the bank in the hands of the receiver. The utmost that he could claim would be to be treated as a general creditor, and entitled

24. Delivery of certificate of stock.—*Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987, reversing 144 Mass. 260, 10 N. E. 844.

25. Certificate not received by subscriber.—*Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987, reversing 144 Mass. 260, 10 N. E. 844.

26. Recovery back of payment where increase fails.—*Winters v. Armstrong*, 37 Fed. 508.

27. Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase, and on the compliance by the corporation with all the requirements of the statute necessary to make the increase of stock valid. And in case of non-compliance with such requirements there is a failure of consideration. *Winters v. Armstrong*, 37 Fed. 508.

A national bank determined in due form to increase its capital stock, but, owing to the entire amount not being taken up, advertised an additional increase, which was not authorized by

vote of the stockholders, and never approved or certified by the United States comptroller, as required by law. Held, that a subscriber for shares of the original increase was not a stockholder, and, upon the bank's insolvency, was entitled to be treated as a creditor to the amount paid in by him. *Schierenberg v. Stephens*, 32 Mo. App. 314.

28. A subscriber who has made payments on his subscription to the proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands. *Winters v. Armstrong*, 37 Fed. 508.

29. Where a proposed increase of the capital stock of a national bank has not been authorized by the comptroller of the currency, as required by Rev. St. U. S., § 5142, a stockholder who has paid the amount of his subscription towards such increase is upon the insolvency of the bank entitled to have such amount set off pro tanto against a note held against him by the bank. *Armstrong v. Law*, 11 O. Dec. 461, 27 Wkly. L. Bull. 100.

as such to participate in the payments made by the receiver. But such a question could not be raised in a case, to which he was not a party.³⁰

§ 241 (2c) Estoppel to Question Regularity.—See ante, "Assent of Stockholders," § 241 (2ab); "Waiver of Right to Insist upon Payment of Full Amount," § 241 (2acc).

§ 241 (2d) Action to Enforce Payment.—Pleadings.—In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank, subsequent to defendants' subscriptions, and with their knowledge, represented to the public by means of circulars, letter heads, etc., that its capital stock had been so increased, and that defendants allowed their names to remain "upon the list of those subscribing for and entitled to such new or increase of stock," but without alleging that the public gave credit to the bank on the faith that defendants were part owners of such increase of stock, or that they allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase.³¹

§ 241 (3) Reduction of Stock.—Right of Stockholders to Capital Set Free by Reduction.—Under Rev. St., U. S., § 5143, empowering a national bank to reduce its capital stock, the capital set free by a reduction must be returned to the stockholders,³² in proportion to their respective holdings,³³ and cannot be kept by the bank,³⁴ and a resolution requiring stockholders to relinquish a pro rata amount of their shares to correspond to the reduction in capital stock, upon the payment of less than the amount of their interest in the capital set free, is void.³⁵

Reduction to Meet Impairment of Capital.—Where the reduction of the capital stock of a national bank is to meet an impairment of equal amount, there can be no distribution among the stockholders.³⁶ In such case the stockholder cannot take the depreciated assets, which were the cause of the impairment, from the assets of the bank and apply them to their own use and benefit.³⁷

30. Right of vice president of bank. —*Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

31. Pleadings.—*Winters v. Armstrong*, 37 Fed. 508.

32. Right to capital set free by reduction.—*Seeley v. New York Nat. Exch. Bank*, 78 N. Y. 608, affirming 8 Daly 400.

33. *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

34. *Seeley v. New York Nat. Exch. Bank*, 78 N. Y. 608, affirming 8 Daly 400.

35. *Seeley v. New York Nat. Exch.*

Bank, 8 Daly 400, affirmed in 78 N. Y. 608.

36. Reduction to meet impairment of capital.—*Jerome v. Cogswell*, 204 U. S. 1, 7, 51 L. Ed. 343, 27 S. Ct. 241.

37. Stockholders in a national bank, to meet an impairment of \$75,000 in the capital stock arising from the insolvency of a borrower and the apparent worthlessness of the collaterals, acting under Rev. St. U. S. 1878, § 5143, reduced the capital stock \$75,000, at the same time voting to take the depreciated securities, which were the cause of the impairment of the capital, from the assets, and place them in the

Claims Which May Be Charged Off.—A national bank, in charging off assets against capital stock withdrawn by consent of the comptroller of the currency, may list in the schedule of charged-off assets claims which are also and primarily listed at a lesser valuation as part of the capital stock.³⁸

Stockholders Who Are Entitled to Proceeds of Charged-Off Assets.—The stockholders of record at the time of the reduction of the capital stock of a national bank, and not those of record at the expiration of its charter, are entitled to the proceeds of the bad or doubtful assets set apart at the time of such reduction, in compliance with the requirement of the comptroller of the currency that such assets should be charged off or set aside for the benefit of those who were then stockholders; the bank, after such reduction, being left with its capital stock, as reduced, unimpaired, and a surplus exclusive of the assets in question.³⁹ Where assets of a national bank are charged off against withdrawn capital stock, and set apart in trust for the benefit of the then stockholders, a subsequent transfer of shares by the stockholders, does not pass the right to the interest of the transferees in the trust fund, notwithstanding the provision of Rev. St. U. S., § 5139 [U. S. Comp. St. 1901, p. 3461], that transferees of national bank stock shall succeed to all the rights and liabilities of their transferrers.⁴⁰ Similarly, shareholders at the time of the creation of the trust

hands of trustees for the benefit of stockholders. Held, that as it must be presumed that the comptroller of the currency, in determining the amount of impairment, took into consideration any value that these collaterals had, they could not thus be withdrawn, as such withdrawal would thereby further impair the capital. *McCann v. First Nat. Bank*, 131 Ind. 95, 30 N. E. 893.

38. Claims which may be charged off.—*Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

39. Stockholders who are entitled to proceeds of charged-off assets.—Judgment, *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

Under Rev. St. U. S., § 5145 [U. S. Comp. St. 1901, p. 3463], providing that the affairs of a national bank shall be managed by the directors, the directors may, on a reduction of the capital stock of the bank by a vote of the shareholders, approved by the comptroller of the currency on the assurance of the president and directors that bad and doubtful assets will be charged off and set aside for the benefit of the then shareholders, charge

off the bad and doubtful assets as, in effect, a dividend from assets in excess of capital stock, and on so doing the right to receive the proceeds of the assets thus set apart is irrevocably vested in those who are shareholders on the date of the approval of the reduction of stock by the comptroller of the currency, and they and their assigns are entitled to whatever is to be distributed. *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

40. Cogswell v. Second Nat. Bank, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

The transfer of shares after the reduction, does not carry any right to an interest in the special trust fund, the proportionate interests therein having vested in the then shareholders as individuals. The result is unaffected by the fact that distribution in cash may have been contemplated as the assets set aside were realized upon. *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

This requirement, though not stated in the certificate of approval of the reduction, was evidently, on the facts, made a condition thereof and presumably in accordance with the practice

fund may at any time thereafter transfer their rights in the trust fund, with or without a transfer of their shares of stock.⁴¹

§ 241 (4) Conversion of Stock by Bank.—An action cannot be maintained against a national bank for conversion of its own capital stock, as a judgment in such action vests the title to the converted property in the wrongdoer, and under Rev. St., § 5201, such bank is prohibited from being a holder of any of its shares.⁴²

§ 242. Subscription to and Issue of Stock.—Estoppel of subscriber to question regularity of increase of stock of bank, see ante, "Capital and Shares," § 241.

§ 242 (1) Effect and Purpose of Issue of Certificate.—A certificate of stock in a national bank, though in due form, may be shown aliunde, to have been issued to the apparent stockholder solely as collateral security for money loaned.⁴³ The law does not invest a certificate of stock in a national bank with such sanctity as to give it immunity against the general rule of law that writings expressing on their face a mere sale of property, specifying the article sold, and acknowledging receipt of payment are in the nature of a bill of parcels, and is between the parties, always open to parol evidence to show the real terms upon which the agreement of sale was made.⁴⁴

§ 242 (2) Payment.—Purchaser Paying Part Cash and Giving Bank a Note for Balance.—A purchaser from a national bank of shares of its capital stock, paying part cash therefor and giving his note for the balance of the purchase price, and leaving the shares of stock in the hands of the bank as collateral security for the payment of the note, cannot defeat a recovery by the bank on the note on the ground that Rev. St., U. S., § 5201, [U. S. Comp. St. 1901, p. 3494], prohibits national banks from making any loan or discount on the security of the shares of its own capital stock, and from becoming the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss on a debt previously contracted in good faith.⁴⁵

of the comptroller's office, and was imposed to the end that justice might be done to the owners of the original shares. *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

41. *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

42. **Conversion of stock by bank.**—*Myers v. Valley Nat. Bank*, Fed. Cas. No. 9,519, 18 N. B. R. 34.

43. **Effect and purpose of issue of certificate.**—*Williams v. American Nat. Bank*, 29 C. C. A. 203, 85 Fed. 376.

44. *Williams v. American Nat. Bank*, 29 C. C. A. 203, 85 Fed. 376.

45. **Purchaser paying part cash and giving a note for balance.**—*Brown v. Ohio Nat. Bank*, 18 App. D. C. 598.

An affidavit of defense, in an action by a national bank on a note, is insufficient which alleges that the note was given to the bank in part payment for ten shares of its capital stock, on the representation by an agent of the bank that the defendant would be made a director; that the bank went into voluntary liquidation before the maturity of a note given in renewal of

§ 242 (3) Rescission.—Subscription Induced by Fraud.—In exceptional cases, where there is no ground for an inference that credit was extended to a national bank on the faith of the ownership of stock by a defendant, he should be permitted to rescind his agreement of subscription after insolvency of the bank, where it was induced by fraud as well when there are creditors as when there are none. There should be no presumption of law to overcome the fact capable of proof in such a case.⁴⁶ A subscription to stock of a national bank induced by fraud may be rescinded after, as well as before, the bank ceases to be a going concern, where no considerable time has elapsed since the subscription, if the subscriber has taken no active part in the management, has been diligent in discovering the fraud and in taking steps to rescind, and where no considerable amount of corporate indebtedness has been created since the subscription, and is still unpaid.⁴⁷ One induced to purchase stock of a national bank by fraudulent representations of the bank, which was in fact the owner of the stock and received the price, cannot make an effectual tender of rescission which will support an action at law to recover the purchase price after the appointment of a receiver for the bank, as neither the bank nor the receiver then has authority to rescind and make restitution of the purchase money.⁴⁸

§ 242 (4) Issuance of Duplicate in Place of Lost Certificate.—A state legislature may provide for the issuance of a certificate of stock by a national bank in the place of a certificate lost by the holder, so long as the remedy afforded to the stockholder does not affect the internal management or policy of the bank nor subject it to any burdens which might touch it in its character as a federal agency.⁴⁹

the original note; that the bank, since going into liquidation, has paid all its depositors and other creditors; that at the time of the purchase the shares of stock, as affiant is informed and believes, and expects to show at the trial, were of no value, and have been of no value since; that affiant was not made a director, or offered the position; and that he expects to show at the trial that it was never the intention of the bank, or those in charge thereof, to offer him such a position, but that he was induced by such fraudulent representations to enter into the arrangement set forth. *Brown v. Ohio Nat. Bank*, 18 App. D. C. 598.

46. Subscription induced by fraud.—*Stufflebeam v. De Lashmutt*, 101 Fed. 367; *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339, 74 Fed. 135, 33 L. R. A. 727. And see, also, *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

47. *Wallace v. Bacon*, 96 Fed. 553.

48. *Wallace v. Hood*, 89 Fed. 11; *Hood v. Wallace*, 38 C. C. A. 692, 97 Fed. 983. Judgment affirmed *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

49. Duplicate of lost certificate.—*In re Hayt*, 39 Misc. Rep. 356, 79 N. Y. S. 845.

Stock Corporation Law (Laws 1892, c. 688, §§ 50, 51) provides for the issuance of a certificate of stock in the place of one lost by the holder on application to the supreme court. Held to apply to an application by a stockholder of a national bank, who has lost her certificate of stock, for the issuance of a new one, under 22 Stat. 1882, c. 290, § 4 [U. S. Comp. St. 1901, p. 3458], providing that the courts of a state shall have the same jurisdiction over suits by or against national banks which they have over suits against banks not organized under any law of the United States. *In re Hayt*, 39 Misc. Rep. 356, 79 N. Y. S. 845.

§ 242 (5) Action to Enforce.—Recovery by Receiver.—A stockholder in a national bank is liable to the receiver thereof on a note given to the bank for capital stock.⁵⁰

Answer.—See ante, "Rescission," § 242 (3).

§ 243. Transfer of Stock.—Effect on liability for debts and acts of bank, see post, "Effect of Transfer of Stock," § 249. Subject to lien, see post, "Lien of Bank on Stock or Dividends," § 245. Liability of pledgee for debts of bank, see post, "Nature and Extent," § 248.

§ 243 (1) Power to Transfer—§ 243 (1a) In General.—The rules governing the transferability of national bank shares are the same in general as those applicable to other corporate shares, i. e., they are salable and transferable at the will of the owner, under regulations of the association as to the manner of transfer.⁵¹ The transferable quality of national bank stock is a matter without the control of state laws, for the reason that the subject has been regulated by Act of Congress (Rev. Stat. U. S., § 5139, U. S. Comp. Stat. 1901, p. 3461), which provides that the stock shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association."⁵²

Bank in Liquidation.—After the expiration of the term of its charter, the stock of a national banking association in liquidation is not transferable, so as to give the transferee the right to share in the election of directors.⁵³

§ 243 (1b) Executor.—See post, "Payment and Delivery of Certificate," § 243 (3b); "Power of Bank to Refuse," § 243 (3da).

50. Recovery by receiver.—Hepburn v. Kincannon, 74 Miss. 691, 21 So. 569; National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448; Gold Min. Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496.

51. Power to transfer.—Johnston v. Lafin, 103 U. S. 800, 26 L. Ed. 532. See, also, Robinson v. Southern Nat. Bank, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

So far as the act of congress is concerned, the doctrine is, as stated in Johnston v. Lafin, 103 U. S. 800, 26 L. Ed. 532, that: "The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies." Leyson v. Davis, 170 U. S. 36, 42 L. Ed. 939, 18 S. Ct. 500, reaffirmed in Farmers' Nat. Bank v. Robinson, 176 U. S. 681, 44 L. Ed. 637, 20 S. Ct. 1027.

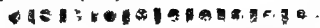
"The power to transfer their stock

is one of the most valuable franchises conferred by congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." First Nat. Bank v. Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172.

Assignability as between seller and purchaser.—See post, "As between the Parties," § 243 (3dbb).

52. Control by state law.—In re Hayt, 39 Misc. Rep. 356, 79 N. Y. S. 845; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369.

53. Bank in liquidation.—Richards v. Attleborough Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.



§ 243 (2) Persons and Corporations to Whom Transferable—

§ 243 (2a) In General.—A stockholder in a national bank may make an actual and bona fide sale and transfer of his stock to any person capable in the law of taking and holding the stock, and of assuming the transferer's liabilities in respect thereto.⁵⁴

§ 243 (2b) Purchase by Bank of Its Own Stock.—Section 35 of the national bank law forbids such bank from becoming the purchaser or holder of its own capital stock, unless to prevent loss on a debt previously contracted in good faith, and then it must dispose of the same within six months.⁵⁵ Under Rev. St., § 5201, prohibiting a national bank from purchasing or holding its own stock, an agreement by an officer of the bank that if another would take stock, and let it stand in his name, the bank would buy the shares from him at any time he wished, is void.⁵⁶

Purchase and Sale of Stock by President—Ratification.—The sale by the president of a national bank, to himself and the cashier, of the stock of the bank, owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank, of its own stock, where he acts in a double capacity of seller and buyer, can not be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. In the one case the sale of the stock is enjoined by law, and its sale by the president may be ratified, however irregular it may have been in the first instance; but the purchase of its own stock by the bank is interdicted by law, and for this act there can be no authorization in advance, and no ratification afterwards.⁵⁷

§ 243 (2c) Purchase of Shares of Another National Bank.—A national bank can not purchase and hold shares in another national bank as an investment.⁵⁸ Whether a national bank may not be deemed a shareholder, within the meaning of § 5151, if it holds shares of another national bank as security for previous indebtedness, is a question suggested in former cases, but not decided, and upon which, in this case, no opinion need be expressed.⁵⁹

§ 243 (3) Mode and Sufficiency—§ 243 (3a) In General.—The statute although it authorizes every national banking association to prescribe the manner of the transfer of shares in capital stock, limits its powers

54. Person and corporations to whom transferable.—*Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65; *Johnson v. Laffin*, 6 Wkly. Dig. 181.

55. Purchase by bank of its own stock.—*Lee v. Citizens' Bank*, 5 O. Dec. 21.

56. Bowden v. Santos, Fed. Cas. No. 1,716, 1 Hughes 158.

57. Purchase of stock from president—Ratification.—*Bundy v. Jackson*, 24 Fed. 628.

58. Purchase of shares of another national bank.—*California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *Merchants' Nat. Bank v. Wehrmann*, 69 O. St. 160, 68 N. E. 1004.

59. Scott v. Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; apparently overruling obiter found in *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Merchants' Nat. Bank v. Wehrmann*, 69 O. St. 160, 68 N. E. 1004.

in that respect, to the extent of prescribing conditions essential to the protection of the association against fraudulent transferers, or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association can not clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders.⁶⁰ The rules which regulate the transfer of the stock of national banks are to be found in the statutes of the United States. The national banking act prescribes no exclusive method of transfer, but authorizes every association to do so.⁶¹

Regulation in Stock Certificate.—Regulations prescribing the manner in which shares of stock in a national bank shall be transferred may be embodied in the by-laws, or only in a provision on the face of the certificate of stock.⁶²

When Law of State Governs.—Where a national bank has not prescribed a special mode, a transfer of its stock must be made according to the law of the state in which the bank is situated.⁶³

Decisions of State Courts.—The decision of the courts of the state in which the bank may be located do not control it.⁶⁴

§ 243 (3b) Payment and Delivery of Certificate.—Stock in a national bank can not be transferred by delivery of the certificate of stock.⁶⁵

As between Seller and Purchaser.—As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares, duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller.⁶⁶

Certificate Containing Blank Form of Indorsement.—The owner of a certificate of stock in a national bank may assign it and appoint an attorney, in blank, though it is an instrument under seal, where the certificate contains a provision making it transferable in person or by attorney, and has a blank form of indorsement.⁶⁷

Transfer by Executor.—An executor's endorsing a transfer on a certificate of stock in a national bank, and delivering it to a purchaser, does not pass the title.⁶⁸

60. Mode and sufficiency.—*Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532.

61. *Scott v. Pequonnock Nat. Bank*, 15 Fed. 494, 21 Blatch. 203.

62. Regulations in stock certificate.—*Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532.

63. When law of state governs.—*Hobbs v. Western Nat. Bank*, Fed. Cas. No. 6,551a.

64. Decisions of state courts.—*Scott v. Pequonnock Nat. Bank*, 15 Fed. 494, 21 Blatch. 203.

65. Payment and delivery of certificate.—*James v. James*, 81 Tex. 373, 16 S. W. 1087.

66. As between seller and purchaser.—*Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65, affirmed in 103 U. S. 800, 26 L. Ed. 532.

67. Certificate containing blank form or indorsement.—*Lee v. Citizens' Bank*, 5 O. Dec. 21.

68. Transfer by executor.—*Weyer v. Second Nat. Bank*, 57 Ind. 198.

§ 243 (3c) Deed.—A deed which conveys all the grantors' "property, real and personal," embraces and conveys all their shares of stock in a national bank.⁶⁹

§ 243 (3d) Recording Transfer—§ 243 (3da) Power of Bank to Refuse.—Under Rev. St., § 5139, providing that the shares of a national bank "shall be transferable on the books of the bank," the directors or other shareholders of a national bank have no authority to approve or reject bona fide transfers of its stock; nor can they refuse to register such transfers without a valid and lawful reason.⁷⁰

Transfer by Foreign Executor.—Where the by-laws or articles of association of a national bank do not otherwise prescribe, the bank is bound under Act of Pennsylvania June 16, 1836, § 3, and Act of Pennsylvania April 8, 1872, § 11, to recognize a transfer of its stock by a foreign executor, duly appointed in another state.⁷¹

§ 243 (3db) Necessity—§ 243 (3dba) In General.—Under Rev. St. U. S., § 5139, shares in national banks are transferable only on the books of the bank.⁷² Those persons only have the right and liability of stockholders who are registered as such on the books of the association. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law.⁷³

§ 243 (3dbb) As between the Parties—§ 243 (3dbba) In General.—As between a shareholder in a national bank and purchaser of his shares the sale is complete on assignment, delivery, and payment without registration on the books of the bank.⁷⁴ Failure to transfer stock in a national bank on the books of the bank, as required by Rev. St. U. S., § 5139 [U. S. Comp. St. 1901, p. 2054], does not affect the validity of the transfer as between the parties, nor as to the person for whose benefit the stock was transferred.⁷⁵ Revised Statutes, U. S., § 5139, providing that the stock of

69. Deed.—Fleckheimer v. National Exch. Bank, 79 Va. 80.

70. Power of bank to refuse.—Johnson v. Laffin, Fed. Cas. No. 7,393, 5 Dill. 65, affirmed in 103 U. S. 800, 26 L. Ed. 532.

Rev. St., § 5139, providing that shares shall be "transferable on the books of the association," does not give the directors power to refuse to register a bona fide transfer of stock without some valid and sufficient reason for such refusal. Johnson v. Laffin, Fed. Cas. No. 7,393, 5 Dill. 65.

71. Transfer by foreign executor.—Hobbs v. Western Nat. Bank, Fed. Cas. No. 6,551a.

72. Necessity.—Weyer v. Second Nat. Bank, 57 Ind. 198.

73. Transfer upon books of bank.—Richmond v. Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

The title to and ownership of stock in a national bank can only pass by a transfer on the books of the bank. Koons v. First Nat. Bank, 89 Ind. 178.

A national bank is the trustee of the stockholders; the shares are in the nature of choses in action; and no transfer of stock can be completed until shown upon the books of the bank. First Nat. Bank v. Smith, 65 Ill. 44.

74. As between the parties.—Johnson v. Laffin, 6 Wkly. Dig. 181.

75. Larimer v. Beardsley, 130 Iowa 706, 107 N. W. 935.

a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association" is for the benefit of the corporation,⁷⁶ its shareholders⁷⁷ and creditors,⁷⁸ only, the corporation being entitled to waive its provisions.⁷⁹

§ 243 (3dbbb) Priority as to Assignee in Bankruptcy.—See post, "Pledge of Stock," § 243 (3dbc).

§ 243 (3dbbc) Priority as to Attachment.—An unrecorded transfer of national bank stock takes precedence of a subsequent attachment of a creditor of the assignor, although neither bank nor creditor had notice of the assignment.⁸⁰

§ 243 (3dbc) Pledge of Stock.—The delivery of a certificate of stock in a national bank, as collateral security for a debt due the pledgee from the shareholder, with a power of attorney to transfer the shares and execute an assignment of them to any other person, confers a power coupled with an interest, and gives to any one claiming under an execution of the power a right to demand of the bank a certificate of stock.⁸¹

The subsequent bankruptcy of the shareholder does not vest in his assignee the right to the shares in question, as against the pledgee, or give him a right to prohibit the bank upon the surrender of the old certificate from issuing a new certificate to the person to whom they were transferred under the power of attorney. The delivery of stock as security for a debt, with the execution of the power of attorney, gave to the pledgee a power coupled with an interest, which was not revoked by the bankruptcy of the shareholder and could only be revoked by the payment of the debt.⁸²

76. Benefit of corporation.—*Doty v. First Nat. Bank*, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259.

Rev. St. U. S., § 5139 (*U. S. Comp. St.* 1901, p. 3461), requiring stock to be transferred by indorsement on the corporate books, does not limit the right to pass title to stock certificates by assignment, being enacted for the protection of the banks, and the corporation being entitled to waive its provisions. *Gray v. Fankhauser (Ore.)*, 115 Pac. 146.

77. Shareholders.—*Doty v. First Nat. Bank*, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259.

78. Creditors.—*Doty v. First Nat. Bank*, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259.

79. Waiver.—*Gray v. Fankhauser (Ore.)*, 115 Pac. 146.

80. Priority as to attachment.—*Hazard v. National Exch. Bank*, 26 Fed. 94. The rights of a transferee of national bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching

creditor of the transferrer without notice. *Doty v. First Nat. Bank*, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259.

81. Pledge of stock.—*Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

A stockholder of a bank pledged a stock certificate containing a provision that the shares of stock were transferable only on the books of the bank on surrender of the certificate, and thereafter transferred the shares of stock to its president, on the books of the bank, to pay a debt to the bank, without a surrender of the certificate by the pledgee. Held, that neither the bank nor its president acquired any title by such transfer. *Lee v. Citizens' Bank*, 5 O. Dec. 21.

82. Rights of assignee in bankruptcy.—*Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

A director in a national bank delivered a certificate of stock accompanied by a power to transfer the same as collateral security to one who held his note. Four months afterwards

Right to Dividends.—One to whom stock in a national bank has been assigned as collateral security may recover the dividends thereon from the bank, if the bank had notice of the transfer and made no objection thereto, notwithstanding a rule of the bank that no transfer of stock shall be valid unless made on its books.⁸³

§ 243 (3dc) Mode and Sufficiency—§ 243 (3dca) Production or Surrender of Certificate.—Without the surrender of the certificate of stock, a bank cannot issue another upon a transfer made by the apparent owner, either in person or by attorney, that will deprive the real owner of his shares.⁸⁴ A by-law of a national bank enacted under an act of congress necessitating the production of an old certificate of stock before the issuance of a new certificate will not impair the authority of the chancellor to order the bank to issue a new certificate, where the one in possession of the old certificate after constructive service fails to appear.⁸⁵

§ 243 (3dcb) Issuance of New Certificate.—The record made of the transfer upon the books of a bank is sufficient, as between the transferee and the bank, to work a change of ownership, and new certificates are not necessary to his becoming the owner of the stock so transferred.⁸⁶

§ 243 (4) Operation and Effect of Transfer—§ 243 (4a) Notice of Provisions of Articles of Association.—A purchaser of national bank stock is bound to take notice of all the provisions of the articles of association.⁸⁷

§ 243 (4b) Right, Title and Liability of Purchaser or Transferee.—Every person becoming a holder of stock of a national bank by transfer on its books in such manner as may be prescribed in the by-laws or articles of the association, succeeds in proportion to his shares to all the rights and liabilities of the prior holder.⁸⁸

Certificate Not Negotiable.—Certificates of stock in a national bank are not negotiable, so as to give a bona fide assignee, with power to transfer, a title free of equities existing against the assignor.⁸⁹

he was adjudged a bankrupt, and an assignee was appointed. Subsequently, the note being unpaid, its holder sold the stock at auction under the statute, after notice to the maker and his assignee in bankruptcy. Held, that the purchaser at the auction sale under the power had a right to demand a transfer from the bank. *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

83. Right to dividends.—*Central Nebraska Nat. Bank v. Wilder*, 32 Neb. 454, 49 N. W. 369.

84. Production and surrender of certificate.—*Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996.

85. Letcher's Trustee v. German

Nat. Bank (Ky.), 119 S. W. 236.

86. New certificate unnecessary.—*Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

87. Notice of provisions of articles of association.—*Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429.

88. Right, title and liability of purchaser or transferee.—Rev. Stat., § 5189. *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

89. Certificate not negotiable.—*Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429.

Bank Having No Lien for Debts of Shareholders.—Where there is no provision in the law of the bank subjecting shares to the payment of a shareholder's debts, a transferee of shares transferable only on the books of the bank by the shareholder or his attorney and by a surrender of the certificate takes a perfect title by transferring the shares under a power to himself, and can require the bank, upon surrender of the certificate, to give a new one, certifying that the shares stand recorded in his own name.⁹⁰

Right to Share of Charged Off Assets upon Reduction of Capital Stock.—See ante, "Reduction of Stock," § 241 (3).

§ 243 (4c) Effect on Title to Assets of Corporation.—The title to the corporate assets of a national bank is in the corporation, and not in a stockholder owning stock therein, and upon a transfer of stock, the title to such assets remains unaffected.⁹¹ A stockholder, a director in a bank organized and existing under the laws of the territory of Oklahoma, having lost a portion of his personal property, which, without his actual knowledge, became inadvertently intermingled with the assets of the bank, and as such appeared upon its books, at the time of the sale of his stock therein, is not estopped to assert title thereto as against the bank, suing thereon as owner, either before or after the completion of the conversion of the bank into a national bank, where the assignee makes no complaint. The assignee might, perhaps, recover in a proper action the difference between the value of the stock in the financial condition the bank was with the warrants added to its assets and what it was with them subtracted therefrom, or he might, perhaps, sue to rescind the sale of the stock on the ground of mistake, but there is no privity between the assignee and the bank upon which the latter can predicate an estoppel and claim title in itself.⁹²

§ 243 (4d) Pledge.—See ante, "Pledge of Stock," § 243 (3dbc).

§ 243 (4e) Transfer in Trust.—The legal title to shares of stock in a national bank may be placed in a transferee thereof, the equitable title thereto remaining in the original owner; and after a retransfer to the owner the stock is not subject to garnishment by creditors of the transferee.⁹³

90. Bank having no lien for debts of shareholders.—*Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996.

91. On title to assets of corporation.—*People's Nat. Bank v. Board (Okl.)*, 104 Pac. 55, affirming 103 Pac. 682.

92. People's Nat. Bank v. Board (Okl.), 104 Pac. 55, affirming 103 Pac. 682.

93. Transfer in trust.—A married woman, being the owner of stock in a national bank, transferred the same to her husband to enable him to qualify

as a director in the bank, on the understanding that as soon as he was elected director he should retransfer the stock. Held, that, though the arrangement resulted in an evasion of the federal statute respecting the qualification of national bank directors, the husband held the stock in trust for his wife until retransferred, and that after the retransfer, though without a consideration, the stock was not subject to garnishment by a creditor of the husband. *Citizens' Nat. Bank v. Sturgis Nat. Bank (Tex. Civ. App.)*, 81 S. W. 550, affirmed in 98 Tex. 612, no op.

§ 243 (5) Damages for Breach of Agreement to Transfer.—The measure of damages recoverable for breach of an agreement to deliver shares of stock in a national bank where the contract price has not been paid, is fixed by § 4985, Revised Statutes of North Dakota, at the excess, if any, of the value of the stock to the buyer, over the amount due on the purchase price.⁹⁴ Rev. Code, § 5012, N. D., providing that the value of a written instrument is presumed to be that of the property to which it entitles the owner, so far as it is applicable to certificates of stock in a national bank, fixes the presumptive value of such stock at its par or nominal value, and the burden of showing a greater value is on the person asserting it.⁹⁵

Section 5010, Revised Codes of North Dakota, which provides that the value of the property to a buyer is deemed to be the price at which an equivalent thing could, within a reasonable time thereafter, be bought in the nearest market, is inapplicable as the means of estimating the value of national bank stock which in itself, or through an equivalent, has no market value.⁹⁶

Report to Comptroller as Basis for Deducting Value of Stock.—A written report of the officers of a national bank to the comptroller of the currency, made pursuant to § 5211, Rev. Stat., U. S., does not purport to give the actual or estimated value of the bank's property, and is incompetent, alone, as a basis from which to deduce the actual value of the bank's stock in an action for breach of an agreement to deliver a number of shares thereof.⁹⁷

§ 243 (6) Enforcement against Bank.—Where a national bank wrongfully refuses to transfer on its books shares of stock and issue new certificates to a person entitled thereto, the remedy at law is not adequate, and it is not a case for compensation in damages, but for specific performance which can only be enforced in a court of chancery.⁹⁸

§ 243 (7) Remedy in Equity to Set Aside Transfer.—A bill in equity will lie by the receiver of a national bank made to set aside a fraudulent transfer of stock made by the holder to escape personal liability, and

94. Damages for breach of agreement to transfer.—*Patterson v. Plummer*, 10 N. Dak. 95, 86 N. W. 111.

95. *Patterson v. Plummer*, 10 N. Dak. 95, 86 N. W. 111.

96. *Patterson v. Plummer*, 10 N. Dak. 95, 86 N. W. 111.

97. Report to comptroller as basis of fixing value of stock.—*Patterson v. Plummer*, 10 N. Dak. 95, 86 N. W. 111.

98. Enforcement against bank.—*Feckheimer v. National Exch. Bank*, 79 Va. 80; *Mechanics' Bank v. Seton* (U. S.), 1 Pet. 299, 7 L. Ed. 152.

L. & S. own shares of stock in N. E. bank of N., and failing, indebted to

the bank, assign the shares to F., trustee. The certificates contain notice of such a by-law. Transfer could only be made upon the books of the bank, which refuses to allow said shares to be transferred to trustee. Latter files his bill, asking that the bank be required to allow such transfer to be made on its books, and to issue new certificates therefor. Held, the remedy at law is not adequate, and it is not a case for compensation in damages, but for specific performance, which can only be enforced in a court of chancery. *Feckheimer v. National Exch. Bank*, 79 Va. 80.

to compel the transferror to pay the amount of the stock.⁹⁹

§ 244. Dividends.—Under Rev. St., U. S. §§ 5199, 5204 [U. S. Comp. St. 1901, pp. 3494, 3495], authorizing directors of a national bank to declare semiannual dividends out of net profits after carrying one-tenth part of the net profits of the preceding half year of the surplus until the same shall amount to 20 per centum of the capital stock, and prohibiting the withdrawal, in the form of dividends or otherwise, of any portion of the capital, assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders by the directors, and dividends so ordered may be made payable in the future, and on the contingency of future collections on such assets.¹

Liability to Refund Fraudulent Dividends.—Where a dividend was fraudulently declared from the capital stock of a national bank after it was in reality insolvent, a stockholder receiving the same is liable to refund at the suit of the receiver of the bank, and the fact that he gave his check to the president of the bank individually, for the same will not relieve him of his liability therefor.² It cannot be urged as a defense to a bill by the receiver of an insolvent national bank against the shareholders, to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits, that the remedies provided by the national banking act are exclusive, since the right to recover diverted trust funds is not dependent on statute.³ A receiver of an insolvent national bank may maintain a suit in equity in any district against all the stockholders within the court's jurisdiction to recover back unearned dividends received by them, and unlawfully paid from the bank's capital when insolvent, on the ground that it is a suit to follow trust funds.⁴

Tax Dividend.—A petition alleging that defendant, a national bank, ordered a tax dividend on its capital stock, the distribution thereof to be

99. Remedy in equity to set aside transfer.—*Bowden v. Santos*, Fed. Cas. No. 1,716, 1 *Hughes* 158.

1. Dividends.—*Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, affirmed in *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343, 27 S. Ct. 241.

2. Dividend declared after insolvency.—*Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

The receiver of an insolvent national bank may recover from a stockholder dividends declared and paid after the bank became insolvent, where necessary to meet the demands of creditors. *Hayden v. Williams*, 37 C. C. A. 479, 96 Fed. 279.

The receiver of a national bank cannot recover a dividend paid not at all out of profits, but entirely out of the capital, where the stockholder receiv-

ing such dividend acted in good faith, believing the same to be paid out of profits, and where the bank, at the time such dividend was declared and paid, was not insolvent. *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

The receiver of a national bank can not recover from a stockholder, in an action at law, a sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent. *Lawrence v. Greenup*, 38 C. C. A. 546, 97 Fed. 906.

3. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60.

4. *Hayden v. Brown*, 94 Fed. 15.

effected by the payment of taxes levied on the shares of stock held by the stockholders, and further alleging that in pursuance of said order the bank paid the taxes levied on the shares of many of the shareholders, but failed to pay the taxes levied on certain other shares belonging to other shareholders, who had assigned their claims for such wrongful discrimination to plaintiff, stated a cause of action.⁵

Stock Pledged.—See ante, "Pledge of Stock," § 243 (3dbc).

§ 245. Lien of Bank on Stock or Dividends.—Contract lien to secure loans, see post, "Purchase by Bank of Its Own Stock or Loaning Money on Security Thereof," § 260 (3). Dividends, see ante "Dividends," § 244.

§ 245 (1) Lien on Stock for Debts Due Bank—§ 245 (1a) In General.—A national bank has no lien on its own stock to secure the indebtedness of a stockholder to the bank,⁶ although such indebtedness is for loans or advances.⁷ Such a lien was provided by the national banking act as originally enacted in 1863 (12 Stat. 665);⁸ but it was repealed by the Act of 1864 (13 Stat. 99).⁹ A national bank is impliedly precluded from

5. Tax dividend.—*Redhead v. Iowa Nat. Bank*, 123 Iowa 336, 98 N. W. 806.

6. Lien on stock for debts due bank.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

Georgia.—*Smith v. First Nat. Bank*, 115 Ga. 608, 41 S. E. 983.

Texas.—A national bank has no lien on its stock to secure a general debt due from the holder thereof. *Goodbar v. City Nat. Bank*, 78 Tex. 461, 14 S. W. 851.

Virginia.—*Feckheimer v. National Exch. Bank*, 79 Va. 80.

As against claim of pledgee of stock.—A stockholder's indebtedness against a national bank can not be set off against the claims of a pledgee of the stock of the former, who received it in pledge to secure the payment of a loan made on the faith of such pledge, without knowledge of the claims of the bank, or that it was insolvent. *McConville v. Means*, 10 O. Dec. 452, 21 Wkly. L. Bull. 193.

7. Loans by national banks to their stockholders do not give a lien to the bank on the stock of such stockholders. *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923.

A national bank does not have a lien upon the stock owned by a customer indebted to it for loans or advances. *Goodbar v. City Nat. Bank*, 78 Tex. 461, 14 S. W. 851.

Plea by indorser for stockholder.—

In a suit by a national bank on a note against the maker and indorser the latter pleaded that the bank had allowed the maker to sell his stock in the bank, under which the bank had a lien, without first requiring payment of the note, thereby releasing the indorser. Held, not error to strike such plea, for the reason that a national bank had no such lien. *Smith v. First Nat. Bank*, 115 Ga. 608, 41 S. E. 983.

8. Under Act of 1863.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

Under the Act of 1863, relating to national banks, such banks had a lien upon their stock owned by their debtors. *Stafford v. Produce Exch. Banking Co.*, 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371, affirming 16 O. C. C. 50, 8 O. C. D. 483; *Lee v. Citizens' Bank*, 5 O. Dec. 21.

9. Under Act of 1864.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

"The Act of 1864 was enacted as a substitute for a prior act, enacted February 25th, 1863, and in many particulars the provisions of the two acts are the same. But the earlier statute, in its sixty-sixth section, declared that no shareholder in any association under the act should have power to transfer or sell any share held in his own right so long as he should be liable, either as principal debtor, surety, or otherwise, to the association for any debt which had become due and

forbidding any transfer of its shares of stock, without the consent of the directors, by a stockholder while he is indebted to the bank, because of the repeal, by Act of June 3, 1864, c. 106 (13 stat. 99), re-enacting, in completer form, the entire law as to national banks, of the provisions of the Act of Feb. 25, 1863, c. 58 (12 Stat. 665), subjecting transfers of stock in a national bank to debts due by the stockholders to the bank, or permitting the board of directors to provide to that effect.¹⁰

§ 245 (1b) Provision in Charter, By-Laws and Stock Certificates.—Provisions in the charter or articles of association¹¹ and by-laws¹²

remained unpaid. This section was left out of the substituted Act of 1864, and it was expressly repealed. Its repeal was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors. * * * *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

Ohio.—Under the Act of 1864, national banks have no lien on their stock owned by their debtors. *Stafford v. Produce Exch. Banking Co.*, 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371, affirming 16 O. C. C. 50, 8 O. C. D. 483.

10. Judgment, *Buffalo German Ins. Co. v. Third Nat. Bank*, 171 N. Y. 670, 64 N. E. 1119, affirmed. *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

11. **Provisions in charter, articles and by-laws.**—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172.

A banking association organized under The National Currency Act of 1864 can not, by virtue of its articles of association create or hold a lien on its stock to secure the indebtedness of a stockholder to it. *Second Nat. Bank v. National Bank* (Ky.), 10 Bush 367.

New York and Ohio.—Unless the articles of association of a banking corporation created under the act of congress of June 3, 1864, expressly authorize the directors by a by-law to make the stock of any of its stockholders subject to a lien in favor of the bank, as security for a debt due by him to the bank, no such lien can be thus created. *Rosenback v. Salt Springs Nat. Bank* (N. Y.), 53 Barb. 495.

The Ohio cases incline to the view that such a lien may be reserved in the bank's articles of associations. See *Lee v. Citizens' Bank*, 5 O. Dec. 21; *Lee v. Citizens' Nat. Bank*, 2 Cin. R. 298, 13 O. Dec. 913; *Stafford v. Produce Exch. Banking Co.*, 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371; *McConville v. Means*, 10 O. Dec. 452, 21 Wkly. L. Bull. 193.

12. **By-Laws.**—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, Fed. Cas. No. 4,573, 2 Biss. 527. See contra *In re Bigelow*, Fed. Cas. No. 1,395, 2 Ben. 469, 1 N. B. R. 667; *Knight v. Old Nat. Bank*, Fed. Cas. No. 7,885, 3 Cliff. 429; *In re Dunkerson*, Fed. Cas. No. 4,156, 4 Biss. 227.

A by-law of a national bank, which, in effect, gives the bank a lien on the stock of a shareholder for all loans or discounts made to him, is void under Act June 3, 1864, § 35, which provides that no association shall make any loans or discounts on the security of the shares of its own capital stock, nor be holder or purchaser of any such shares, unless to prevent loss on a debt previously contracted in good faith. *Evansville Nat. Bank v. Metropolitan Nat. Bank*, Fed. Cas. No. 4,573, 2 Biss. 527.

The provisions of the 36th section of The Currency Act of 1863, restricting a shareholder from transferring his stock as long as he owes the bank, could not be retained in operation, although the section was repealed by the Act of 1864, by means of a by-law adopted when the section was in force, declaring that the stock of the bank shall be transferable only on the books of the bank, subject to the provisions and restrictions of the act of congress aforesaid. *First Nat. Bank v.*

of a national bank forbidding a transfer of stock where the stockholder is indebted to the bank¹³ and the insertion of a condition to the same effect in

Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172.

Ultra vires.—Such by-law amounts simply to an attempt on the part of the bank to exercise the power which was granted under the Act of 1863, but which was denied by the Act of 1864; and is ultra vires and inoperative. *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524. See *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923.

A by-law giving to a bank a lien on stock of its debtors is not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," within the meaning of The National Banking Act of 1864, and therefore not such a regulation as, under the act, national banks have a right to make. *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923.

"The 5th section of that act enacts that the articles of association 'shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs.' And the 8th section of the same act empowers the board of directors 'to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred.' There are other powers conferred by the act, but unless these confer authority to make and enforce a by-law giving a lien on the stock of debtors to a banking association, very plainly it has not been given." *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923.

"Whatever power, therefore, the directors of a bank possess to regulate transfers of its stock, they derive, not from the fifth section of the act, and not from the articles of association, but from the eighth and twelfth sections by express and direct grant. It can not, therefore, be maintained that the present case is not governed by the decision made in *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172, because the articles of association for the eagle bank authorized the directors to make a by-law restricting the transfer of stock. In that case

there was a by-law prohibiting the transfer, as in this. Independent of the 36th section of the Act of 1863, there was as much authority to make and enforce such a by-law as is given by the Act of 1864." *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923.

Kentucky.—*Second Nat. Bank v. National State Bank* (Ky.), 10 Bush 367.

A national bank may, by a by-law, subject the shares of a stockholder to a lien for his debt to the bank, so as to prevent a transfer on the books until such debt is paid. *Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996.

New Jersey.—A national bank has no lien, through its by-laws, on its own stock for a debt due from a stockholder to the bank. *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 340.

New York.—*Conklin v. Second Nat. Bank*, 53 Barb. 512, note.

Under National Banking Act, § 35 (13 Stat. 110), providing that "no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," a by-law of a national bank, providing that no transfer of its stock shall be made by any stockholder who is liable to the association, "which liability shall be a lien upon the said stock, and all profits thereof and dividends," is inoperative. *Judgment* 51 N. Y. S. 667, 29 App. Div. 137, reversed. *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107.

Ohio.—A national bank can not reserve any lien on its stock by means of a by-law. *Stafford v. Produce Exch. Banking Co.*, 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371; *McConville v. Means*, 10 O. Dec. 452, 21 Wkly. L. Bull. 193.

Virginia.—Under the act of congress, national banks acquire no lien upon its stock enacting by-laws so as to make it liable for the debt due the bank. *Fleckheimer v. National Bank*, 79 Va. 80.

13. Stockholder indebted to bank.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801,

its certificate of stock,¹⁴ are void and inoperative because repugnant to the text of the national bank law and in conflict with the public policy which that act embodies.¹⁵ Such provisions are inoperative even as against the assignee in bankruptcy of the stockholder.¹⁶

Notice of Claim of Equitable Lien.—Where a by-law of a national bank, providing that a liability of a stockholder of the bank shall be a lien on the stock, is rendered inoperative by the National Banking Act (13 Stat. 110), a printed statement on the certificate of shares in such bank, to the effect that the bank claimed a lien thereon by virtue of such by-law, does not operate as notice to a purchaser of such certificate of an equitable lien claimed by the bank.¹⁷

§ 245 (1c) Express Agreements.—A national bank can not acquire a lien upon its stock by express agreement so as to make it liable for the debt due the bank.¹⁸

Verbal Agreement That Stock Is Security for Loan without Delivery Thereof.—Under National Banking Act, § 35 (13 Stat. 110), pro-

24 S. Ct. 524; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172.

14. Condition in stock certificate.—*Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524; *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172.

New York.—Under Currency Act 1864 (13 Stat. 99), prohibiting a national bank from making any loan or discount to a stockholder on the faith of his stock, etc., a provision in the stock certificates of a national bank that the stock was not transferable until all the former stockholder's liabilities to the bank were paid is void, and will not give the bank a lien on its stock for a debt due from the stockholder arising from collections made by him for the bank. A debt arising from the proceeds of such collection amounts to a loan, within the prohibition of the act. *Conklin v. Second Nat. Bank*, 53 Barb. 512, note.

15. *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

Where a thing is against the spirit and policy of a statute (as this sort of lien is here declared to have been contrary to the spirit and policy of the Banking Act of 1864), a permission in favor of it can not be implied from general expressions; even supposing that liberally construed they embraced the case. *Bullard v. National*

Eagle Bank (U. S.), 18 Wall. 589, 21 L. Ed. 923.

16. In *Bullard v. National Eagle Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923, a by-law and form of certificate, adopted after the enactment of the statute of 1864, reserving the right to refuse to transfer stock in a national bank where the stockholder was indebted to the bank, was decided to be inoperative even as against the assignee in bankruptcy of the stockholder. *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

17. Notice of claim of equitable lien.—*Judgment*, 29 App. Div. 137, 51 N. Y. S. 667, reversed. *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107.

"The contention that, although the condition in the certificate was void, nevertheless it operated as a notice to the insurance company, and thereby deprived it of its right to compel the transfer of the stock, but asserts in another form that there was power, by the insertion of such a condition in the certificate of stock to deprive the stock of a national bank of its attribute of sale like any other personal property. The contention wholly ignores not only the text of the law, but the rule of public policy which the National Bank Act has been decided to embody." *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

18. Express agreements.—*Fekheimer v. National Exch. Bank*, 79 Va. 80,

viding that no association shall make any loan on the security of the shares of its own stock, a national bank is not entitled to an equitable lien on the stock of a member who is indebted to it, and who, without delivering possession of his stock, has agreed that it might be considered as security therefore, as against one who purchases such stock in good faith.¹⁹ To constitute a pledge of such stock, there must be an actual delivery thereof to the bank. A mere verbal understanding is insufficient.²⁰

§ 245 (1d) Liquidation of Bank.—A national bank can acquire no equitable lien as against an indebted stockholder on his distributive share of the assets on a liquidation of the bank's affairs.²¹

245 (2) Setting Off Debts from Stockholder against Dividends.—A national bank may lawfully set off indebtedness of a stockholder to the bank against dividends accruing on such stockholder's shares,²² aliter as to dividends accruing after his death.²³

§ 246. Rights and Liabilities of Stockholders in General—

§ 246 (1) Right to Examine Books, Papers, etc.—Stockholders in a national bank are entitled to inspect books of the corporation. The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by Rev. St. U. S. § 5211 [U. S. Comp. St. 1901, p. 3498], requiring such banks to make reports to the Comptroller of the Currency, or by § 5240 [U. S. Comp. St. 1901, p. 3516], providing for the appointment of examiners to in-

19. Verbal agreement that stock is security for loan without delivery thereof.—Judgment, 29 App. Div. 137 51 N. Y. S. 667, reversed. *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107.

20. The mere statement by L., a bank shareholder, in a conversation with the president of the bank when the last loan was made to him, that his stock was a security to the bank, did not amount to a pledge of such stock, as there was no delivery of the certificates. As tersely said by the court below: "If we assume the existence of a contract between the defendant bank and L. (and all we know of it is the testimony of the president of the defendant as to a conversation with L., in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. *Third Nat. Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. Ed. 801, 24 S. Ct. 524.

21. Liquidation of bank.—Judgment, 106 App. Div. 616, 94 N. Y. S. 1140, affirmed. *Bridges v. National Bank*, 183 N. Y. 146, 77 N. E. 1005.

Where the assignor in an assignment for the benefit of creditors was indebted to a bank as an indorser, and after the assignment the bank went into liquidation, in an action by the assignee against the bank to recover the assignor's distributive share of the assets, the assignor's indebtedness to the bank could not be set off. Judgment, 106 App. Div. 616, 94 N. Y. S. 1140, affirmed. *Bridges v. National Bank*, 183 N. Y. 146, 77 N. E. 1005.

22. Setting off debts from stockholder against dividends.—*First Nat. Bank v. De Morse* (Tex. Civ. App.), 26 S. W. 417.

23. Upon the death of a stockholder in the Bank of Washington, insolvent, and indebted to the United States, the bank has no right to set off the dividends accruing upon his stock, after his death, against notes upon which he was indorser. *Brent v. Bank*, Fed. Cas. No. 1,834, 2 Cranch, C. C. 517.

investigate the condition of such banks, or by § 5241 [U. S. Comp. St. 1901, p. 3517], providing that no such bank "shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice."²⁴

State statutes providing that stockholders of private corporations shall have access to all the books, records, papers, etc., of the corporation at proper and reasonable times, apply to national banks.²⁵

24. Right to examine books, papers, records, list of shareholders, etc.—

Judgment, *Harkness v. Guthrie*, 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664, affirmed. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

No definition of "visitorial powers" can be held to include the common-law right of the shareholder to inspect the books of the corporation. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

"That the statute did not intend in withholding visitorial powers to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute." *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

In § 5210 it is provided that a list of shareholders shall be kept, subject to inspection by the shareholders and creditors of the corporation and the officers authorized to assess taxes under state authority. The purpose of this section seems obvious, in view of the other provisions of the statute, authorizing taxation by the state, upon the shareholder (§ 5219), and providing for the individual liability of the shareholder to an amount equal to his stock in cases of insolvency. (Section 5151.) This court has said that one, if not the principal, object of this section was to require information as to the shareholders upon whom may rest individual liability for contracts, debts or other engagements of the bank. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4, citing

Pauly v. State Loan, etc., Co., 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465.

There is nothing in § 5211, requiring reports to be made to the comptroller of the currency, or in § 5240, providing for the appointment of examiners to investigate the condition of national banks, which cuts down the usual common-law right in shareholders in such corporations. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

Corporation a mere instrumentality of bank.—Where a corporation was organized by national bank officers as a mere instrumentality of the bank itself to liquidate a claim due the bank, and all the bank's stockholders had an equitable interest in the corporation, none of the officers or directors of which paid for their stock, such officers were estopped to object to a stockholder's right to examine the corporation's books as a stockholder thereof because the one share which stood in his name had never been delivered to him nor removed from the stock books. *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

25. Code 1886, § 1677, which provides that stockholders of all private corporations have the right to have access to, and inspection and examination of, the books, records, and papers of the corporation, at all reasonable and proper times, applies to national banks located within the state. *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734.

The rights of stockholders conferred by the above statute are not curtailed by, nor is the statute in conflict with, Rev. St. U. S., §§ 5240, 5241, which provide that national banks are subject to examination by an officer appointed by the comptroller of the treasury for that purpose, and that they shall not be subject to visitorial powers other than those authorized by congress, or vested in the courts of justice. *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734.

An application by a bona fide stockholder of a national bank to examine

Time and Place and Purpose.—The stockholder must make his demand at a proper time and place and the notice must disclose a legitimate reason therefor, since the stockholders are only entitled to inspect the books of a national bank for proper purposes and at proper times,²⁶ as, for instance, in order to determine the value of his stock²⁷ or for negotiating for the purchase of stock.²⁸

Right to Make Copies, Extracts and Memoranda.—Since it is not to be presumed that the shareholder can carry in his memory all the information disclosed by an examination of the books, and, as the inspection is granted for the purpose of informing him concerning the matter, he has the

its books, accounts, loans, etc., in order to determine the value of his stock, is not a visitation of the corporation, within Rev. St. U. S., § 5241 [U. S. Comp. St. 1901, p. 3517], providing that no national banking association shall be subject to any visitatorial powers, etc., so as to prevent the stockholder from obtaining such relief under Rev. St. Utah, § 329, declaring that all books of any corporation shall be subject to the inspection of any bona fide stockholder at all reasonable hours. *Harkness v. Guthrie*, 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664, affirmed in *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

Rev. St. U. S., § 5210 [U. S. Comp. St. 1901, p. 3498], requires a national bank to keep a list of shareholders, which shall be subject to the inspection of all shareholders during business hours. Corporation Law, Laws 1892, p. 1831, c. 688, § 29, requires stock corporations to keep a stock-book, which shall be open to the inspection of stockholders, who may make extracts therefrom. Banking Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514], provides that national banking associations shall be deemed citizens of the state within which they are located. Held, that a shareholder of a national bank located in the city of New York was entitled to examine its list of shareholders, and to make extracts therefrom for the purpose of negotiating for the purchase of stock. *Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. S. 173.

26. Time and place and purpose.—*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

A national bank stockholder on February 1, 1906, served on the directors

written demand for an examination of its books and records, stating that he would renew the demand in person on February 5, 1906, at 3 p. m. at the banking office, and that inspection was desired to commence at that time and continue at such hours as would not interfere with the bank's business. The notice cited a list of records to be inspected, and recited that it was to ascertain the true financial condition of the bank, the true value of its assets and capital stock, to ascertain the amount, nature, and date of the bank's losses through certain dealings with specified persons, and to investigate certain documents desired for use in a law suit commenced by relator. Held, that relator's demand was made at the proper time and place, and that the notice disclosed a legitimate reason therefor. *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

Where relator had sued for false representations made by directors of a national bank on which relator had purchased shares of the bank's stock at a price in excess of its true value, that relator discontinued such suit and recommenced it in the federal courts did not deprive him of the right to compel the bank's officers to permit an examination of its records to ascertain the true value of its assets and stock, the amount of its losses in certain specified dealings, and the existence of documents essential as primary evidence in the pending action. *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

27. Harkness v. Guthrie, 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664, affirming *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

28. Lorge v. Consolidated Nat. Bank, 105 App. Div. 409, 94 N. Y. S. 173.

right to make such copies or memoranda as will make the inspection effectual not only by conveying to his mind the contents of the book but also by enabling him to retain the same in such form that he may act thereon for any legitimate purpose. The right of inspection, therefore, carries with it the right to take such extracts from the books as will enable the shareholder to retain the information disclosed by the inspection.²⁹

Jurisdiction of State Courts.—State courts have jurisdiction to compel officers of a national bank to permit a stockholder's examination of the records and documents for a proper purpose.³⁰

Mandamus by State Courts.—Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus,³¹ in view of the provision of the Act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), that, for actions against national banks at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the federal circuit and district courts shall have jurisdiction only as in cases between individual citizens of the same state.³²

Discretion of Court to Issue.—In issuing the writ of mandamus the court will exercise a sound discretion and grant the right properly to safeguard and protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes.³³

§ 246 (2) Assessment to Restore Impaired Capital Stock—§ 246 (2a) Who May Make.—On notice from the comptroller, under Rev. St., § 5205, that the bank's capital is impaired so as to require an assessment on the stockholders, such assessment is to be made by the stockholders themselves, and an assessment by the directors is void.³⁴ Directors of a na-

29. Right to make copies, extracts and memoranda.—*Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. S. 173.

30. Jurisdiction of state court.—*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 18 N. W. 581.

31. Mandamus by state court.—*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4, affirming 75 Pac. 624; *Winter v. Baldwin*, 89 Ala. 483, 7 So. 734.

32. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

33. Discretion of court to issue.—*Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

The supreme court of New York has power, in its discretion, to compel the officers of a national bank in process of liquidation, on expiration of its charter by limitation to exhibit books, papers, and assets of the bank to the stockholders and to permit them to examine and to take extracts therefrom. *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

Appeal.—In New York it has been held that where the discretion of the supreme court in issuing a writ of mandamus to compel the directors of a national bank in liquidation to allow stockholders to examine its books and papers has been lawfully exercised, the act will not be reviewed by the court of appeals. *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

34. Who may make.—*Hulitt v. Bell*, 85 Fed. 98.

tional bank are not empowered, without action of the stockholders, to levy an assessment ordered by the comptroller for the purpose of restoring its capital and enabling it to continue business, by U. S. Revised Statutes, §§ 5136, 5145 (U. S. Comp. Stat. 1901, pp. 3445, 3463), investing them with authority to transact the usual and ordinary business of national banks, since the provision of § 5205 (U. S. Comp. Stat. 1901, p. 3495), for the appointment of a receiver to close up the business of the banking association in case it fails to pay up its capital stock, and refuses to go into liquidation, evidently confers upon the association the privilege of declining to make good the deficiency, and to elect, instead, to go into voluntary liquidation, the exercise of which would seem to be a matter in which the owner, and not the managers, of the bank primarily are interested.³⁵

§ 246 (2b) Enforcement.—An assessment to restore impaired capital, under Rev. St., § 5205, is only enforceable by subjecting the stock of persons refusing to pay, and no action will lie against the stockholders personally.³⁶ A sale of the shares of a shareholder in a national bank, the capital stock of which is impaired, under Rev. St. U. S., § 5205, as amended by the Act of June 30, 1876, requiring a sale of such stock to meet the assessment for the deficiency, is void, unless the stock bring an amount equal to the assessment placed thereon.³⁷

§ 246 (2c) Rights of Paying and Nonpaying Shareholders upon Liquidation of Bank.—Where a number of the shareholders of a national bank in good faith paid an assessment made to comply with a requirement of the comptroller to make good an impairment of the bank's capital, although such assessment was invalid because made by the directors instead of by the stockholders, on the insolvency of the bank, and the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the non-paying

35. *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 48 L. Ed. 425, 24 S. Ct. 253, affirming 41 Ore. 359, 68 Pac. 806.

Rev. St. U. S., § 5205, provides that every national banking association whose capital stock shall have become impaired, by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each, and that if any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association. By

§ 5151 the liability of a stockholder is the par value of his shares in addition to the amount invested in such shares. Held that, the only liability of a stockholder being under § 5151, which arises only on liquidation, on receiving notice from the comptroller, the question whether the investment of the shareholders shall be increased is one for them to determine, and an assessment by the directors is unauthorized. *Weinhard v. Commercial Nat. Bank*, 41 Ore. 359, 68 Pac. 806. Affirmed *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 48 L. Ed. 425, 24 S. Ct. 253.

36. **Enforcement.**—*Hulitt v. Bell*, 85 Fed. 98.

37. *Merchants' Nat. Bank v. Fouche*, 103 Ga. 851, 31 S. E. 87.

shareholders, and repaid the amounts so paid, before general distribution of the remaining assets among all the shareholders.³⁸

§ 246 (2d) Collateral Agreements between Shareholders.—To recover on a promise of defendant shareholders in a national bank to pay plaintiff's assessment and keep his stock good, the plaintiff must show that the stock was worth the sum for which it sold, plus the assessment and voluntary payment required.³⁹

§ 246 (3) Withdrawal upon Renewal of Charter.—**When Shareholders Cease to Be Such.**—Under the Act of July 12, 1882, c. 290, § 5, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), which provides that when a national bank has amended its charter, for the purpose of renewing the same, as therein provided, and has obtained a certificate of approval from the comptroller, "any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal," etc., a shareholder ceases to be such on giving notice of withdrawal within the required time.⁴⁰

Appraisal of Value of Stock of Withdrawing Stockholders.—A committee appointed under Act of Congress of July 12, 1882, to appraise the value of the shares of shareholders of a national bank who do not assent to amendments to the articles of association, and have signified their intention to withdraw, may amend a mere clerical error in their award at any time before appeal therefrom to the comptroller of the currency, although the shareholder has been notified of the award, and has accepted it in its original form.⁴¹

§ 246 (4) Right of Voting Trust to Divert Funds.—Majority stockholders of a national bank, who enter into an illegal voting trust agreement, may not divert the funds of the bank for the payment of expenses of preparing the agreement and of defending an action involving its validity.⁴²

38. Right of paying and nonpaying shareholders upon liquidation of bank.—In re Hulitt, 96 Fed. 785.

The assets of a national bank being considered insufficient to pay its debts, the comptroller ordered an assessment of 39 per cent on the stock. One of the stockholders, who was indebted to the bank, had been sued thereon, and his stock was attached, and sold at sheriff's sale therefor, and on this stock no assessment was paid. After the assessment the comptroller unexpectedly collected a claim of \$8,000 due the bank, which amount was turned over to the agent of the stockholders. Held, that the purchaser of

shares at the sheriff's sale was not entitled to share in such fund until the assessments were refunded to the shareholders who had paid them. *Richardson v. Wallace*, 39 S. C. 216, 17 S. E. 725.

39. Collateral agreements between shareholders.—*Sharp v. Levan* (Pa.), 84 Atl. 915.

40. When shareholder ceases to be such.—*Kimball v. Apsey*, 164 Fed. 830.

41. Appraisal of value of stock of withdrawing stockholders.—*First Nat. Bank v. Breneman*, 114 Pa. 315, 7 Atl. 910.

42. First Nat. Bank v. Holderness (N. C.), 76 S. E. 624.

§ 247. Liability of Stockholders for Debts of Bank⁴³—§ 248. — Nature and Extent^{43a}—§ 248 (1) In General—§ 248 (1a) Nature and General Rule as to Liability.—Each shareholder of a national banking association is individually liable for its debts, to the extent of the amount of his stock, at its par value, in addition to the amount invested in the shares held by him.⁴⁴ A person who becomes a stockholder in a national bank thereby submits himself to the provisions of The National Bank Act, and becomes liable to be assessed to the extent of his statutory liability for all debts of the bank existing while he holds his stock.⁴⁵

The purpose of the provision of the National Banking Law relating to the liability of stockholders is that in case of the insolvency of the bank, its shareholders shall be liable for its debts to the extent of the amount of their stock, and the law is to be considered in view of such purpose.⁴⁶ It was the intention of congress (Rev. St., § 5151) to make the excess of the cost of the stock of a national bank, up to the par value, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, in case the property of the bank is insufficient to pay its debts.⁴⁷

Nature of Liability.—The liability of a stockholder of a national bank to assessment on the bank's insolvency is one created by statute,⁴⁸ for the sole benefit of the bank's creditors.⁴⁹ It is a conditional liability imposed by

43. Action to recover assessment paid under erroneous belief as to liability, see post, "Actions by or against Receiver," § 287 (4).

43a. Defenses to action, see post, "Conditions Precedent and Defenses," § 250 (3).

44. Nature and general rule as to liability.—*Irons v. Manufacturers' Nat. Bank*, 21 Fed. 197; *King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

45. *Young v. Wempe*, 46 Fed. 354.

"All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they can not enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders." *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

The first bank law was passed Feb. 25, 1863, c. 58, 12 Stat. 665. The last

clause of § 12 is as follows: "For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares." This provision was changed in 1864, and has been since and is now in force. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

46. The purpose.—*Studebaker v. Perry*, 43 C. C. A. 69, 102 Fed. 947, affirmed in 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463.

47. *Irons v. Manufacturers' Nat. Bank*, 21 Fed. 197.

48. Nature of liability.—*Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirming 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843, affirming *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; *First Nat. Bank v. Hawkins*, 24 C. C. A. 444, 79 Fed. 51, reversing 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739; *Aldrich v. Skinner*, 98 Fed. 375.

49. Benefit of creditors.—*Scott v. Latimer*, 89 Fed. 843, 33 C. C. A. 1, affirmed in *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

law as an incident of ownership,⁵⁰ but it is conditional only, in that all the ordinary resources of the bank must be first exhausted before the stockholders are proceeded against.⁵¹

Several, Contractual and Statutory.—Individual liability of a stockholder is contractual in its nature although there is no direct contract with any one, and it arises by force of the statute.⁵² It is that of principals, not

50. Conditional liability.—The liability of a stockholder in a national bank, who has made full payment for his stock, to pay assessments for the benefit of the bank's creditors, is not contractual, but is a conditional liability imposed by law as an incident to ownership of the stock. *Aldrich v. Skinner*, 98 Fed. 375.

"The individual liability is an inseparable incident to national bank shares, for which the lawful holder is liable; but this liability is his own debt, and attaches to a specific several article of his property—the share of stock." *Merchants' Nat. Bank v. Wehrmann*, 69 O. St. 160, 68 N. E. 1004.

51. *Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551. And see *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

52. Contractual in nature.—*Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Whoever becomes a stockholder in a national bank assumes this liability as an element of his contract. *Irons v. Manufacturers' Nat. Bank*, 21 Fed. 197.

Essential element of contract.—"The individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788. *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274.

By entering into the relation of a

shareholder in a national banking association, the shareholder subjected himself to the obligation created by the statute. *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

Liability voluntary and attaches to ownership of stock.—"Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation." *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750. See, also, *Whitman v. National Bank*, 176 U. S. 559, 44 L. Ed. 587, 20 S. Ct. 477.

Arises from subscription.—"The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises." *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Liability by force of statute, not contract with bank.—The liability of a shareholder to an assessment is not a contractual liability flowing from his acquisition of the shares, but a liability arising by force of the statute. *First Nat. Bank v. Hawkins*, 24 C. C. A. 444, 79 Fed. 51, reversed 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739.

The liability of a stockholder in a national bank for assessments made by the comptroller on its insolvency is not dependent upon the contract of

of sureties,⁵³ and is several and not joint.⁵⁴

Distinct from Assessment to Restore Capital Stock.—The statutory double liability of holders of national bank stock under § 5151, U. S. Rev. Stat., is entirely distinct from the assessment to restore impaired capital stock under § 5205, Rev. Stat., which is voluntary and imposed by the stockholders' own vote.⁵⁵

subscription between the stockholder and the corporation. *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843, affirmed *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

The liability of a national bank shareholder does not arise wholly out of contract between him and the bank or its creditors; but, upon becoming a shareholder, there is no direct contract with anyone, and he becomes, as was held in *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290, "by force of the statute, individually responsible to the amount of his stock, for the contracts, debts and engagements of the bank equally and ratably with other shareholders. Such statutory liability was created for the protection of creditors, and in order to strengthen the bank in the confidence of the public. The bank, although its shares of stock were private property, was an instrumentality of the general government in the conduct of its affairs. Farmers', etc., *Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *In Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502, the court said that 'national banks are instrumentalities of the federal government, created for public purposes, and as such are necessarily subject to the paramount authority of the United States.' This principle was reaffirmed in *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288. See, also, *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718." *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

53. Liability that of principal not surety.—The liability which shareholders in national banks incur under § 12 of the Act of 1864, which provides for a liability "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," is that of principals, not of sureties. *Hobart v. Johnson*, 8 Fed. 493, 19 Blatchf. 395.

54. Several, not joint.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed.

476; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Merchants' Nat. Bank v. Wehrmann*, 69 O. St. 160, 68 N. E. 1004.

The individual liability in addition to the amount invested in the shares, as is entirely clear from the language employed in creating it, is several and can not be made joint, and the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

55. Distinguished from assessment to restore capital.—The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under § 5205, Rev. Stat., is not the assessment contemplated by § 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts, and engagements of the association. The assessment as made under § 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may or may not be applied by them to the payment of creditors, and in the ordinary course of business certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas under § 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under § 5151 is made by authority of the comptroller of the currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39. See post, "Payment of Assessment to Restore Capital Stock," § 250 (3be).

§ 248 (1b) Persons Deemed to Be Shareholders for Purpose of Assessment.—Liability Dependent on Ownership, Real or Apparent.

—Liability for an assessment on the shares of an insolvent national bank may arise in two classes of cases: i. e., in the case of the registered owner of stock who is not the real owner, and in that of the real owner of stock registered in another's name.⁵⁶

The real owner the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of § 5151,⁵⁷ whether the shares are registered in his name or not.⁵⁸ As

56. Liability dependent on ownership, real or apparent.—The owners of stock in a national bank are liable, and those who held themselves out, or allow themselves to be held out, as owners of stock, are also liable, for the debts of the bank, whether they own stock or not. *Case v. Small*, 10 Fed. 722, 4 Woods 78.

"There are two classes of cases of this character—one, wherein the liability has been enforced against a party defendant in whose name the stock was registered on the books of the bank, regardless of the question whether he was, in point of fact, the owner of said stock; and the other, where the liability has been enforced against the real owner of the stock, although the stock stood registered on the books in the name of a third person. In the former class, the liability is said to be created by the act of the party in whose name the stock is registered, in holding himself out as a stockholder, and thus inviting others to deal with the bank and become creditors, relying on the reputation and financial strength of the nominal stockholders." *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383. See, also, *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Persons may be treated as shareholders, within the meaning of § 5151, who hold themselves out, or allow themselves to be held out, as owners of stock in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners. *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in

Harmon v. National Park Bank, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525.

Estoppel to deny liability as shareholder.—See post, "Estoppel to Deny Liability as Shareholder," § 248 (7).

Subscriber to proposed increase of stock.—See post, "Conditions Precedent and Defenses," § 250 (3).

Illegality or irregularity in increase of stock.—See post, "Conditions Precedent and Defenses," § 250 (3).

Purchaser induced by fraud.—See post, "Liability of Transferee," § 249 (3).

Person purchasing stock for another.—See post, "Liability of One Holding Stock as Trustee," § 248 (3).

Shares standing in name of agent of purchaser.—See post, "Liability of Both Transferor and Transferee," § 249 (2).

Religious society a shareholder.—See post, "Liability of One Holding Stock as Trustee," § 248 (3).

57. Real owner.—*Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383. See *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

58. Registry immaterial.—*Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525; *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

Where the real ownership of the stock is in one his liability may be es-

a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended,⁵⁹ and in fixing the liability, the effort of the court should be to ascertain who is the actual owner, and to hold him, releasing the apparent owner, if he has done nothing to deceive or mislead.⁶⁰ The question of the actual ownership of the stock, upon the evidence, is one for the jury.⁶¹

A mistake or error in keeping the official list of shareholders will not permit creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association.⁶²

Directors of Bank.—A director of a national bank is conclusively presumed to have notice of the number of shares of stock standing in his name on the books of the bank at the time of his election and during the period of his service; and is liable to assessment upon such number of shares upon the insolvency of the bank.⁶³

established, notwithstanding the registered ownership is in the name of a person, fictitious or otherwise, who holds for him. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

Where in fact the shares are not registered in the name of the true owner, the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

Registration in name of another to conceal ownership.—Under the provisions of the national banking act relating to the registration of certificates of stock in national banks, making such stock transferable on the books of the bank, and subjecting such a transferee to the liabilities of a shareholder, one purchasing registered stock with his own money, but causing transfers to be made in the name of another, so as to conceal his real ownership, is a shareholder, and subject to liability as such. *Davis v. Stevens*, Fed. Cas. No. 3,653, 17 Blatchf. 259.

59. *Hulitt v. Ohio Valley Nat. Bank*, 69 C. C. A. 609, 137 Fed. 461, affirmed *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

60. *Lucas v. Coe*, 86 Fed. 972.

61. Question for jury.—Where the case really turned upon the actual ownership of the shares, this question was properly left to the jury as one of

fact. Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553. See *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

62. Mistake in official list of shareholder.—*Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877.

63. Directors.—*Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Rev. St., § 5146, disqualifies any person from being a director of a national bank unless he owns at least ten shares of its stock; and § 5147 requires each director, when elected, to take an oath that he is the owner of the number of shares of stock required, subscribed by him, or standing in his name on the books. Section 5210 requires the president and cashier to cause to be kept a correct list of the names of all the shareholders, and the number of shares held by each. Held, that a person who was elected a director, and on the same day appointed vice president and acting cashier, and who served as such for about two months, must be conclusively presumed to have had knowledge of the

Purchase of Stock Illegally Bought by Bank.—The illegality of a purchase by a national bank of its own stock does not relieve one who subsequently buys it from the bank from liability as a stockholder.⁶⁴

Liability of National Bank on Stock of Another Owned by It.—Since a national bank cannot lawfully acquire and hold the stock of another

fact that fifty shares of stock were standing in his name on the books at the time of his election, and during the period of his service; and, the bank having become insolvent, he could not escape individual liability for an assessment of 100 per cent, as the owner thereof, by showing that in fact he had no knowledge that the shares stood in his name until some twenty days before the bank closed its doors, when he at once repudiated their ownership; especially so as the shares were still allowed to stand in his name until the bank closed. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136, affirming 34 Fed. 124.

"The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it can not be held, with any safety to the interests of the public and of those who deal with national banks, that a director, who also is vice president and acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge." *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

His action in respect of the 25 per cent dividend, after he learned of it on the 2d of January, 1884, was such as not to relieve him from his liability for the \$1,250. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Director presumed to own ten shares.—In the absence of any proof on the subject, it is to be presumed that a director took the oath prescribed in § 5147, when he was appointed, that he owned ten shares of the stock. From the time he was appointed a director and vice president and acted as such until he purchased the twenty shares he was violating the law during that interval, unless he owned during that space of time at least ten shares of the stock; and if he took the oath prescribed by § 5147, he took it untruly if he did not own, when he took it, 10 shares of the stock.

Finn v. Brown, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Reason for requiring list of stockholders.—The act of congress requiring of each national bank that a list of its stockholders shall be kept posted in some place in their business office, was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. See *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465.

64. Purchase of stock illegally bought by bank.—Judgment, 38 C. C. A. 510, 97 Fed. 865, affirmed. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

Although it is true that the statute declares that no national bank shall be the purchaser or holder of any of its own shares of capital stock (Rev. Stat., § 5201), violation of this provision by the bank will not relieve from liability one who holds a certificate of its stock and enjoys the right of a shareholder, though it be the same stock so illegally purchased by the bank. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

"It can not be held that the purchase by the bank of its own shares of stock was void. It was of course a matter of which the government by its officers could take cognizance; and it may be that it was a matter of which stockholders, having an interest in the proper administration of the affairs of the bank, could complain in a proceeding instituted by them to restrain the bank from violating the statute. But, when the violation of the statute has occurred, it is not a matter of which a shareholder can complain in order that he may be relieved from the liability attaching to him as a shareholder and which the receiver seeks to enforce under the orders of the comptroller." *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

as an investment, it may in the case of such an actual purchase allege the unlawfulness of its action, and it is not estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the controller of the currency under § 5151, Rev. Stat. U. S.,⁶⁵ aliter where its acquisition results from a pledge or satisfaction of a debt.⁶⁶

State or Private Bank Nationalized—No Certificate Issued.—The fact that new certificates had never been issued to the stockholders of a bank which had become a national bank with their consent, does not prevent their being liable as national bank stockholders.⁶⁷

Persons Holding Stock for Bank Itself.—Under Rev. St., § 5201, prohibiting a national bank from purchasing or holding its own stock, an agreement by an officer of the bank that, if another would take stock, and let it stand in his name, the bank would buy the shares from him at any time he wished, is void, and cannot be set up to relieve the holder from liability.⁶⁸

Purchase by Parent in Names of Minor Children.—One buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders, so as to bind themselves to the liabilities thereof.⁶⁹

65. Stock purchased as an investment.—First Nat. Bank *v.* Hawkins, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

A national bank, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in another national bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the controller of the currency, by alleging the unlawfulness of its own action. First Nat. Bank *v.* Hawkins, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

66. A national bank having accepted and caused to be transferred to it, as collateral security for a loan, certain shares of stock in another national bank, made a colorable transfer of the same to one of its clerks. On the insolvency of the latter bank, the former was sued as a stockholder therein. Held, that such a loan was not prohibited by law, and that the defendant

was liable. *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448. See post, "Liability of Pledges," § 248 (4).

67. State or private bank nationalized—No certificate issued.—Where parties had owned shares of the stock of a bank before it became a national bank, and though the state bank had become a national bank with their consent, and they had received dividends, they had not received new certificates, but the stock ledgers of the bank, however, show that one hundred and thirty shares stood in their name when the bank failed, therefore taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

68. Person holding stock for bank itself.—*Bowden v. Santos*, Fed. Cas. No. 1,716, 1 Hughes 158.

69. Purchase by parent in names of minor children.—*Foster v. Chase*, 75 Fed. 797.

The father's liability on stock bought in name of minor child is not affected by the fact that after the assessment, but before suit was brought to recover it, the son became of age, and assented to holding the stock. *Foster v. Wilson*, 75 Fed. 797.

§ 248 (1c) Obligations for Which Stockholders Liable.—Loans Incurred as Step to Voluntary Liquidation.—Notes given by the proper authorities of a national bank, for money borrowed to meet pressing demands, shortly before the bank, by vote of the stockholders, went into voluntary liquidation, are claims for which both assenting and nonassenting stockholders are liable under their statutory liability.⁷⁰

Obligation Incurred after Bank Has Gone into Liquidation.—The officers of a national bank have no power to incur a liability on the part of such bank after it has gone into liquidation which will be binding on the shareholders, and a judgment on a liability so created, rendered against the bank by collusion of the officers, is not conclusive on the shareholders.⁷¹

Guaranty on Which Principal Has Been Released.—Where the principal obligor upon paper guaranteed by a national bank has been released from liability thereon, the bank being thus released, it is not a claim against the stockholders, and cannot be made so by an ultra vires agreement of the officers.⁷²

70. Loans incurred as step to voluntary liquidation.—*Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stockholders were liable, as provided by Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3465]. *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286. Affirmed *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495, and *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

The notes of a national bank, given when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are its valid obligations, which can be enforced against its stockholders after voluntary liquidation. *Decree*, *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498.

71. Obligation incurred after bank has gone into liquidation.—*Moss v. Whitzel*, 108 Fed. 579.

72. Guaranty on which principal has been released.—A guaranty of payment was made by a national bank of notes given P. dated August, 1873, and due in one year from date, which were discounted for the bank, soon after their date, by the state bank of B. These notes were secured by a trust deed upon land in the vicinity of the city of Chicago. The national bank suspended payment and went into voluntary liquidation on or about the 23d of September, 1873, and, when these notes matured, about a year afterwards, dealings were had between the state bank and H., then acting as president of the national bank, in liquidation, and assuming to act also for his bank, by which the title to the real estate held as security for the payment of these notes was transferred to H., and H. thereupon gave his notes for the amount due on the other notes, and also for a large amount of other indebtedness held by the state bank, on which the national bank or H., or both, were liable, and, as is found by the master, P., in consideration of a quitclaim deed from himself and wife to H., of the land covered by the trust deed securing his notes, was released from further liability on these notes. This release of P. from the notes which the national bank had guaranteed, operated to release the guarantor, and hence there was no valid claim against the stockholders on their individual liability on account thereof. *Schrader*

Expenses of Liquidation and Receivership.—The stockholders cannot be required to contribute, as a debt due from the bank or themselves, to a fund for the payment of the expenses of the receivership, where the receiver was appointed under the original bill, before any claim was set up on behalf of the complainant and the other creditors against the stockholders upon their individual liability, to collect the proper assets of the bank and reduce them to money, so that they might be applied to the payment of its creditors. Such expenses must be paid by the creditors at whose instance he was appointed. But on involuntary liquidation under comptroller's supervision, the rule is different and such cost and expenses must be paid out of fund.⁷³

§ 248 (1d) Amount of Liability.—The assessment of each stockholder is such part of the deficit as his stock is of the capital stock at par value,⁷⁴ but the par value of the stock is the limit of liability;⁷⁵ and the

v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

Although the state bank brought suit on this guaranty now in question and obtained judgment thereon, such judgment is not conclusive against the defendants in this case, who are stockholders in the Manufacturers' National Bank, against whom an assessment is asked. Aside from the authorities cited, which show that the stockholders of the national bank are not concluded by this judgment, which was rendered after the bank went into liquidation, the fact shown in this record, that the dealings between the state bank and H. and P., by which P. was released, were unknown to the defendant stockholders at the time this judgment was rendered, should allow these stockholders to go behind the record of that judgment, and raise the question before the court, in this suit, whether the guaranty was released by the release of P., the principal debtor, whose notes were guaranteed. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

It was proper for the circuit court, after the decision in *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788, to permit the claim of the state bank to be re-examined, to ascertain whether it was a valid claim against the stockholders of the national bank. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

The agreement of H., made after the bank went into liquidation, to continue its guaranty upon the notes, a liability under which the state bank is now at-

tempting to enforce against the stockholders, is not binding upon them, in view of what was said by this court in the case of *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

73. Expense of receivership as charge on fund, to be provided for.—"The case differs in this respect from that of an involuntary liquidation under the supervision of the comptroller of the currency. The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. The equivalent for them, in the case of creditors, who upon the voluntary liquidation of the bank seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

74. Calculation of assessment.—"In the process to be pursued to fix the amount of the separate liability of

75. Merchants' Nat. Bank v. Wehrmann, 69 O. St. 160, 68 N. E. 1004.

insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly.⁷⁶

Loss Sustained by Receivers.—Where stockholders of a national bank have paid an assessment to a receiver of the bank, the receiver becomes the trustee of the creditors; and any loss he may sustain by investments, in endeavoring to save the debts of the bank, cannot be charged to the shareholders, and made the subject of an additional assessment.⁷⁷

Return of Surplus.—If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders.⁷⁸

Liability of Transferror to Existing and Future Creditors.—See post, "Liability of Transferror," § 249 (1).

Additional Assessment.—See post, "Second or Successive Assessment," § 248 (2d).

§ 248 (1e) Facts Relieving from Liability.—See ante, "Persons Deemed to Be Shareholders for Purpose of Assessment," § 248 (1b); post, "Conditions Precedent and Defenses," § 250 (3).

§ 248 (1f) Persons Who May Enforce.—See post, "Persons Who May Enforce and Parties Plaintiff," § 250 (4aa).

§ 248 (1g) Release, Satisfaction and Discharge.—The liability of a stockholder in a national bank to assessment by the comptroller of currency on its insolvency cannot be modified or released by any act of the bank,⁷⁹ certainly after its insolvency;⁸⁰ and the same is true of the re-

each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the shareholders; 2, the amount of the deficit to be paid after exhausting all the assets of the banks; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It can not in the aggregate exceed the entire amount of the par value of all the stock." *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

76. Effect of insolvency of stock held by bank.—*United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

Where the comptroller assessed each shareholder a certain per cent upon

the par value of each share of his stock, and ordered the receiver to collect the assessment, which sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over, but by reason of the insolvency of many of the shareholders the assessment netted an inadequate sum, no further assessment can be made. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

77. Loss sustained by receivers.—*Lease v. Barschall*, 106 Fed. 762.

78. Return of surplus.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

79. Release satisfaction or discharge.—*Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843, affirmed in *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

80. The bank can not after its suspension and the appointment of a receiver, discharge the defendant from

ceiver.⁸¹

Payment of Assessment to Restore Capital.—See post, "Conditions Precedent and Defenses," § 250 (3).

§ 248 (1h) Right of Stockholder to Prefer Creditors of Bank.—Under the Act of Congress, June 30, 1876, § 2 (19 Stat., 63), provides that the individual liability of shareholders of an insolvent national bank, fixed by Rev. St., § 5151, may be enforced by a bill in the nature of a creditors' bill brought by any creditor on behalf of himself and all other creditors, a mortgage of all his individual property executed by a cashier and stockholders of such bank, after it had closed its doors, to secure a depositor, is a preference, and void as against judgment recovered against the cashier by the receiver under Rev. St., § 5151, either in the hands of the receiver or of a purchase from him for value.⁸²

§ 248 (2) Decision of Comptroller of Currency.—The power appears to be vested in the comptroller to determine when it is necessary to collect from the stockholders, and the amount to be collected; but not to establish the liability, or determine when it accrues.⁸³ As the power of the comptroller is derived from a statute of the United States, it cannot be controlled or limited by state statutes.⁸⁴

§ 248 (2a) Authority, Time and Data.—The comptroller of the currency, at such time as he deems proper, and upon such data as are satisfactory to him, may pass upon the necessity of instituting proceedings

any liability attaching to him as a shareholder. Upon the failure of the bank, the rights of creditors attach and can not be effected by anything that the bank or its officers may, after such failure, have done or omitted to do. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

81. Receiver's power.—Although "the defendant alleges that he tendered to the receiver the certificate of stock received by him for cancellation, notifying and informing the latter that, because of the fraud and deceit practiced upon him by which he was induced to purchase or attempt to purchase the stock represented by the certificate, he disaffirmed the contract of purchase or pretended purchase of the stock, and demanded that the receiver receive the certificate and cancel it and repay the sum of twenty thousand dollars paid by him, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount, which tender and demand the receiver refused to ac-

cept or accede to, such tender was an idle ceremony and added nothing to the rights of the defendant; for the receiver had no power to accept or cancel the certificate or to relieve the defendant from the responsibility attaching to him as one appearing upon the books of the bank as a shareholder and to whom had been accorded by the bank the privileges of a shareholder. His duty was to take charge of the assets of the bank and to enforce such assessment upon shareholders as was made by the comptroller in virtue of the statute." *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

82. Right of stockholder to prefer creditors of bank.—*Gatch v. Fitch*, 34 Fed. 566.

83. Decision of comptroller of currency.—*King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

84. Rankin v. Barton, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29. See, also, *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

against national bank stockholders to enforce their personal liability as such.⁸⁵

§ 248 (2b) Necessity.—See post, "Action of Comptroller," § 250 (3a).

§ 248 (2c) Operation and Effect—§ 248 (2ca) In General.—The original order of the comptroller of the currency levying an assessment on the shares of a national bank, over his official signature and seal, proves itself, and fixes the liability of the shareholders from its date, no demand being necessary.⁸⁶

§ 248 (2cb) Conclusiveness of Decision.—Under the acts of congress the comptroller of the currency is constituted a quasi judicial tribunal to determine at what time and what amounts, not exceeding the full liability of the stockholders, it is necessary to collect from them to pay the debts of the bank;⁸⁷ and hence the action of the comptroller of the currency in ordering an assessment upon the stockholders of an insolvent national bank, whether a first assessment or one made subsequently,⁸⁸ is a judicial determination⁸⁹ of the necessity for such assessment⁹⁰ and its amount,⁹¹

85. Authority time and data.—Waldron v. Alling, 73 App. Div. 86, 76 N. Y. S. 250; Kennedy v. Gibson (U. S.), 8 Wall. 498, 19 L. Ed. 476; Rankin v. Barton, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220.

86. Operation and effect.—Brown v. Ellis, 103 Fed. 834.

87. Conclusiveness of decision.—Deweese v. Smith, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971.

88. Aldrich v. Campbell, 38 C. C. A. 347, 97 Fed. 663.

89. Aldrich v. Campbell, 38 C. C. A. 347, 97 Fed. 663; Deweese v. Smith, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971; S. C., 97 Fed. 309.

90. Conclusiveness of necessity.—Aldrich v. Campbell, 38 C. C. A. 347, 97 Fed. 663; Aldrich v. Yates, 95 Fed. 78; Deweese v. Smith, 97 Fed. 309; Strong v. Southworth, Fed. Cas. No. 13,545, 8 Ben. 331; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227.

It is no defense to a suit by the receiver of a national bank against a stockholder to recover the amount of an assessment made by the comptroller of the currency that the assessment was not needed by the receiver. Strong v. Southworth, Fed. Cas. No. 13,545, 8 Ben. 331.

In winding up an insolvent national bank, the comptroller of the currency is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced; and no

appeal lies from his decision. Bailey v. Sawyer, Fed. Cas. No. 744, 4 Dill. 463.

91. Conclusive as to amount.—Strong v. Southworth, Fed. Cas. No. 13,545, 8 Ben. 331.

Where a national bank becomes insolvent, the order of the comptroller of the currency as to the amount of an assessment to be made upon the stockholders is binding, and can not be controverted by the stockholders in a suit against them for the recovery thereof. Kennedy v. Gibson (U. S.), 8 Wall. 498, 19 L. Ed. 476; Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307.

In an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, the necessity of the comptroller's making as large an assessment as that in suit can not be litigated. O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227.

"That the comptroller had authority to make the assessment against stockholders, and that such assessment is conclusive as to the amount to be collected, can not be questioned. Kennedy v. Gibson (U. S.), 8 Wall. 498, 19 L. Ed. 476; Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307; Keyser v. Hitz, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290; Bushnell v. Leland, 164 U. S. 684, 41 L. Ed. 598, 17 S. Ct. 209." Christopher v. Norvell, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

Where the comptroller has ordered that each stockholder shall pay to the

from which no appeal lies,⁹² which is conclusive upon the stockholders,⁹³ and cannot be collaterally attacked⁹⁴ or questioned in any litigation which may ensue, either at law or in equity.⁹⁵ His decision of such questions are open to avoidances by a court only in a direct attack on them for error of law, fraud, or mistake.⁹⁶ But they do not involve any judgment by him as to the judicial rights of the parties to be effected or liable for the assessment.⁹⁷

Validity of Debts of Bank.—The fact of an assessment by the comptroller upon the stockholders of a national bank does not conclude such stockholders as to the validity of the debts to pay which the assessment is made, and they are entitled to their day in court upon that question before being required to pay the assessment in an action against them by the receiver. Where the defendants in such an action assert the invalidity of a judgment against the bank which is the basis of the assessment, the appropriate procedure would seem to be for them to file a bill in equity to determine the validity of such judgment, and to enjoin the action against them, giving bond for the payment of the judgment therein in case the judgment should be dissolved after hearing.⁹⁸

receiver the par of his stock, this order can not be controverted in a suit against the stockholder. It is conclusive upon him, and makes it his duty to pay. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476. What may be done or intended with respect to other stockholders is immaterial in his case. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307, the stockholder having no right to examine the accounts of the receiver as to the assets or debts of the bank. *Man v. Cheeseman*, Fed. Cas. No. 9002a.

92. No appeal.—*Bailey v. Sawyer*, Fed. Cas. No. 744, 4 Dill. 463.

93. Conclusive upon stockholder.—*Man v. Cheeseman*, Fed. Cas. No. 9002a; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663; *Aldrich v. Yates*, 95 Fed. 78; *Waldron v. Alling*, 73 App. Div. 86, 76 N. Y. S. 250.

Stockholders of an insolvent national bank are bound by the action of the comptroller of the currency in making an assessment against them. *Man v. Cheeseman*, Fed. Cas. No. 9,002a.

94. Collateral attack.—*Deweese v. Smith*, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971; *Aldrich v. Yates*, 95 Fed. 78.

When a national banking association is insolvent, the order of the comptroller of the currency, declaring to what extent the individual liability of the stockholders shall be enforced, is conclusive and can not be questioned collaterally. *Casey v. Galli*, 94 U. S.

673, 24 L. Ed. 168, 307; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476, cited and approved; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

95. *Waldron v. Alling*, 73 App. Div. 86, 76 N. Y. S. 250; *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663.

Receiver's action.—The comptroller of the currency, in deciding to make a requisition to pay the debts of an insolvent national bank, acts quasi judicially, and his decision can not be impeached in a receiver's action to recover the assessment, when the specific facts are pleaded with certainty, except for want of jurisdiction, or other ground of equitable interference. *Ran-kin v. Ware* (Kan.), 127 Pac. 531.

96. Error of law, fraud or mistake.—*Deweese v. Smith*, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971.

97. Not determination of judicial rights.—*First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739.

98. Validity of debts of bank.—*Moss v. Whitzel*, 108 Fed. 579.

A plea is bad which sets up that the comptroller has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from these claims, there are means enough to meet the just liabilities of the bank. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

§ 248 (2cc) Liquidated Claim Subject to Assignment Sale, etc.

—See post, "Sale or Assignment of Claim for Liability of Stockholder," § 250 (1bac).

§ 248 (2d) Second or Successive Assessment.—The decision of the comptroller of the currency that it is necessary to collect, and his requisition of a certain percentage of the liability of the shareholders of a national bank, in order to pay its debts, is not a decision that a larger percentage will not be necessary, and he has plenary power to make successive assessments until the full liability of the shareholders is exhausted.⁹⁹

§ 248 (3) Liability of One Holding Stock as Trustee.¹—Persons holding stock in a national bank, as executors, administrators,² guardians,³ or trustees, are not properly subject to any liabilities as stockholders, it ap-

99. Second or successive assessment.—*Deweese v. Smith*, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971; *Studebaker v. Perry*, 43 C. C. A. 69, 102 Fed. 947, affirmed in 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463. See post, "Judgment," § 250 (6).

The comptroller of the currency is authorized to make a second assessment upon the shareholders of an insolvent national banking association, where the first assessment proves insufficient to pay the debts and liabilities of the bank, by Rev. St. U. S., § 5234 [U. S. Comp. St. 1901, p. 3507], empowering him, if necessary to pay the debts of such association, to enforce the individual liability of its shareholders, which, by § 5151 [Id., p. 3465], is measured by the par value of their stock in addition to the amount invested therein, so long as both assessments do not exceed that amount. Judgment 43 C. C. A. 69, 102 Fed. 947, affirmed. *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463.

"The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the amount of their stock therein, and it would be a singular construction of law that would empower the comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability." *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

The comptroller has power to order successive assessments against the

stockholders of an insolvent national bank, ratably on all, where the aggregate does not exceed the par value of the stock. *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 663.

The ultimate liability of a stockholder of an insolvent national bank, under Rev. St., § 5234, is for the full amount of the par value of his stock, if that amount is required; and when the comptroller makes an assessment for a smaller amount, he has power to make a second assessment, if the first proves insufficient to pay the debts of the bank. *Aldrich v. Yates*, 95 Fed. 78. But the United States circuit court of Missouri, in *Deweese v. Smith*, 97 Fed. 369, has held: the ordering of the making and enforcement of an assessment on the stockholders of an insolvent national bank by the comptroller is a quasi judicial act, which exhausts the power and jurisdiction conferred upon him by the statute, and he is without authority to make a second assessment.

1. Estoppel to deny liability.—See post, "Estoppel to Deny Liability of Shareholder," § 248 (7).

2. Executor or administrator.—When a stockholder in a national bank dies his administrator or executor succeeds to his title to, rights in, and liability upon the shares which he held. *Earle v. Rogers*, 105 Fed. 208.

3. Guardian (as such) owning stock.—Under Rev. St. U. S., § 5152 [U. S. Comp. St. 1901, p. 3465], where a guardian, as such, owns stock in a national bank, neither he nor his ward is subject to any personal liability as stockholder, but only the estate of the ward in his hands is liable. *Clark v. Ogilvie*, 111 Ky. 181, 23 Ky. L. Rep. 552, 63 S. W. 429.

pearing upon the proper books of the bank that they hold the same as trustees, etc.,⁴ but a person appearing on the books of a national bank to be absolute owner of stock is subject to stockholders' liability, though holding it as trustee.⁵

Name of Cestui Que Trust Omitted.—Where the failure to insert the name of the cestui que trust in the certificate of stock is the fault of the bank, there being no fraud, concealment or negligence on the part of the trustee in whose name as trustee they were issued, the trustee is not liable.⁶

Father Holding as Trustee for His Minor Children.—Rev. St., § 5152 (U. S. Comp. St., 1901, p. 3465), providing that persons holding stock in national banks as trustee shall not be personally liable as stockholders, applies to every one holding stock as trustee, and a father who, as trustee for his children, invested funds belonging to them in such stock, is not personally liable for an assessment thereon, although the fund invested arose from an investment of his own money previously made by him in their behalf.⁷ Where stock in a national bank at the time of its failure was held by a trustee for the benefit of his children, the fact that the trust estate was wiped out of existence, so far as value or financial responsibility was concerned, by the failure of the bank, did not charge the trustee individually

4. Trustees.—*Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471; *Lucas v. Coe*, 86 Fed. 972.

5. Apparent owner a trustee.—*Kerr v. Urie*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493; *Lucas v. Coe*, 86 Fed. 972.

Where one appears on the books of a national bank to be the owner of stock therein, he can not, in an action to enforce his individual liability for assessment on the stock, the bank having become insolvent, show that he had the stock as trustee, and hence, under Rev. St., § 5151, not personally liable. *Davis v. First Baptist Soc.*, Fed. Cas. No. 3,633, 44 Conn. 582.

One taking stock in a national bank, who does not designate on the books of the bank that he holds the stock as trustee, or in some other representative capacity, thereby assents to becoming liable for payment of the bank's debts, to the extent of the liability fixed by statute. *Davis v. First Baptist Soc.*, Fed. Cas. No. 3,633, 44 Conn. 582.

6. Name of cestui que trust omitted.—A trustee, though not appointed by a will or an order of a court or judge, is not personally liable for assessments against stock of an insolvent national bank owned by this cestui que trust, but standing in his name, where he

has been guilty of no fraud, concealment, or negligence. *Lucas v. Coe*, 86 Fed. 972.

Father holding as trustee for his minor children.—Judgment 152 Fed. 801, affirmed. *Fowler v. Gowing*, 91 C. C. A. 569, 165 Fed. 891. See ante, "Persons Deemed to Be Stockholders for Purpose of Assessment," § 248 (1b).

7. Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3465], provides that shareholders of every national bank shall be individually responsible for all contracts, debts, and engagements thereof to the extent of the amount of their stock therein at its par value, in addition to the amount invested in such shares, and § 5152 declares that persons holding stock as trustees shall not be personally liable for any liabilities as stockholder, but the estates and funds in their hands shall be liable in like manner as if the person beneficially interested held the stock in his own name. Held, that where a father voluntarily declared a trust of certain shares in a national bank for the benefit of his children in good faith, and not for the purpose of evading liability, and did not hold himself out as the owner of the stock individually, he was not personally liable as a stockholder on the failure of the bank. *Fowler v. Gowing*, 152 Fed. 801.

as a stockholder with the additional statutory liability imposed by Rev. St. §§ 5151, 5152 [U. S. Comp. St. 1901, p. 3465].⁸

One to whom the shares are assigned in trust as security for a debt due a third person, and following whose name on the stock book of the bank is the word "trustee," is not liable for the assessment under § 5151, and is also within the provision of § 5152, exempting from such liability persons holding stock as trustees.⁹

Assignee for Creditors.—Under Rev. St. U. S., § 5151, making the stockholders of national banks individually responsible for the debts of the bank, to the extent of their stock, an assignee for the benefit of creditors of a stockholder is bound to pay the assessment levied by the receiver of the bank after its insolvency, though it is levied after the assignment.¹⁰

Person Purchasing Stock for Another.—One who purchases stock in a national bank with his own money on the suggestion of another person that the latter would buy such stock as the former "could get hold of," without being under any obligation to convey the stock to the other, is not a trustee within the meaning of Rev. St., § 5152, exempting a person holding stock as a trustee from personal liability as a stockholder.¹¹

Religious Society.—Where a religious society with a bequest of money, purchased and held in its own name shares in a national bank, it is not a trustee, and is liable to assessment for debts of the bank.¹²

Persons Holding for Bank Itself.—See ante, "Persons Deemed to Be Shareholders for Purpose of Assessment," § 248 (1b).

§ 248 (4) Liability of Pledgees—§ 248 (4a) In General.—Rev. St., § 5151 (U. S. Comp. St. 1901, p. 3465), providing that the owner of shares in a national banking association shall be liable to the amount of his stock for the debts of the bank, applies only to the actual owner of the stock, and not to a bona fide pledgee thereof as collateral security.¹³ A pledgee of national bank stock which he took as collateral security for a loan is not chargeable with the personal liability for the debts of the bank imposed on "shareholders" by Rev. St., U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], unless he has either become the owner of the shares in fact,¹⁴ or has held himself out to be the owner, and thereby es-

8. *Fowler v. Gowing*, 152 Fed. 801.

9. **Trustee as security for debt due third person.**—*Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471.

10. **Assignment for creditors.**—*Graham v. Platt*, 28 Colo. 421, 65 Pac. 30.

11. **Person purchasing stock for another.**—*Horton v. Mercer*, 71 Fed. 153, 18 C. C. A. 18.

12. **Religious society.**—*Davis v. First Baptist Soc.*, Fed. Cas. No. 3,633, 44 Conn. 582.

13. **Liability of pledgees.**—*Williamson v. American Bank*, 107 C. C. A. 286, 185 Fed. 66.

14. *Higgins v. Fidelity Ins., etc., Co.*, 46 C. C. A. 509, 108 Fed. 475, affirmed in *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

The act of congress was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank. The liability upon shareholders is to the extent of the amount of their stock at the par value thereof, "in addition to the amount invested in such

topped himself to deny his personal liability as such.¹⁵ A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by any action which is required or is proper for the protection of both his own interest and those of the pledgor, and not inconsistent with the retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.¹⁶

§ 248 (4b) Unregistered Pledgee.—A pledgee of shares of stock in a national bank, who does not appear, by the books of the bank or otherwise, to be the owner, is not liable for an assessment on the shares on the insolvency of the bank, under Rev. St., § 5151, rendering shareholders liable for the debts of the association to the extent of the par value of their stock.¹⁷ For the purposes of the national banking act, the pledgor of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another.¹⁸

§ 248 (4c) Transfer to Pledgee Absolute in Form.—A person, who by way of pledge or collateral security for a loan of money, accepts stock of a national bank and allows a transfer to be made to him on the books of the bank as owner, incurs an immediate liability as a stockholder,¹⁹ and

shares." The word "invested" plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and can not refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted. *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877, approving *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181.

15. *Higgins v. Fidelity Ins., etc., Co.*, 46 C. C. A. 509, 108 Fed. 475; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

A pledgee of national bank stock is not liable as a stockholder for assessments, except by estoppel. *Baker v. Old Nat. Bank*, 86 Fed. 1006.

Estoppel to deny liability.—See post, "Estoppel to Deny Liability of Shareholder." § 248 (7).

16. *Higgins v. Fidelity Ins., etc., Co.*, 46 C. C. A. 509, 108 Fed. 475, affirmed

Rankin v. Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

17. Unregistered pledgee.—*Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *Wilson v. Merchants' Loan, etc., Co.*, 183 U. S. 121, 46 L. Ed. 113; *Welles v. Larrabee*, 36 Fed. 866, 2 L. R. A. 471.

18. *Hulitt v. Ohio Valley Nat. Bank*, 69 C. C. A. 609, 137 Fed. 461, judgment affirmed *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

19. Transfer to pledgee absolute in form.—*Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Ran-*

cannot relieve himself therefrom by making a colorable transfer thereof to another person for his own benefit,²⁰ or with the understanding that at his request it shall be retransferred.²¹

Reason for Rule.—For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus becoming entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder.²²

Effect of Payment of Debt Secured.—Under the provisions of the National Banking Act, the transferee of shares of the capital stock of a national bank, under a transfer made absolute in due form on the books of the bank, is liable to creditors of the bank as a stockholder, notwithstanding the transfer was in fact made as collateral security for the payment of a debt, which has since been paid, the shares still standing on the books of the bank in the name of the transferee at the time of the suspension of the bank.²³

kin v. Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Moore v. Jones*, Fed. Cas. No. 9,769, 3 Woods, 53.

In *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525, the law as laid down in *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448, was somewhat relaxed, and a tendency manifested to look more closely at the equities. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

Where the legal title to stock is taken by a transferee, who receives it as security for a loan made by him to the bank, he becomes liable as a stockholder to the bank's creditors. *Wheelock v. Kost*, 77 Ill. 296.

Persons who hold stock in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in the contemplation of the national banking act, stockholders, and, so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47.

The transferee of stock or shares in

a national bank at the time of the failure of the bank is, where the transfer appears to be absolute on the books of the bank, liable for the debts of the association to the extent of the shares held by him, notwithstanding he holds them by transfer or assignment as collateral security for a loan to the shareholder from whom he received the transfer. *Hale v. Walker*, 31 Iowa 344, 7 Am. Rep. 137.

20. Colorable transfer to third person.—*McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

21. Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. Ed. 448; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274.

22. Reason for rule.—*Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

23. Effect payment of debt secured.—*Bowden v. Farmers', etc., Bank, Fed. Cas. No. 1,714*, 1 Hughes 307.

§ 248 (4d) Transfer to Pledgee "as Pledgee."—One who does not appear in the certificate, or upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association—nothing else appearing—is not liable as a "shareholder" of such association within the meaning of Rev. Stat., § 5151, and is not subject to the liability imposed by that section upon shareholders of national banks,²⁴ though the pledgor continues to be liable.²⁵

§ 248 (4e) Transfer to Third Person to Secure Unpaid Debt Due Pledgee.—A pledgee of shares of stock in a national bank, with a power of attorney to transfer the same, does not become liable as owner for an assessment thereon by causing them to be transferred on the books of the bank to a third person for the purpose of being held by him as trustee for both parties, and in accordance with the contract of pledge,²⁶ although the pledgor did not expressly authorize such transfer,²⁷ and notwithstanding the fact that the pledgee procured a transfer to an irresponsible person with the avowed purpose of avoiding such liability,²⁸ but the real owner will be

24. Transfer to pledgee "as pledgee."—*Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383. See *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

A corporation which holds certain shares of stock in a national bank as collateral security for a loan, and is carried on the registry of the bank as the holder of such stock "as pledgee," is not subject, on the bank's insolvency, to the statutory liability of a stockholder. *Pauly v. State Loan, etc., Co.*, 5; *Fed. 430*, affirmed in 7 C. C. A. 422, 58 Fed. 666, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465.

25. Pledgor continues holder.—*Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

26. Transfer to third person to secure unpaid debt due pledgee.—*Hayes v. Fidelity Ins., etc., Co.*, 105 Fed. 160; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877.

A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a stockholder, can not be treated as one, and subjected to an assessment, under Rev. St., § 5151, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt. *Wilson v. Merchants' Loan, etc., Co.*, 39 C. C. A. 231, 98 Fed. 688, affirmed in 183 U. S. 121, 46 L. Ed. 113.

27. *Hayes v. Fidelity Ins., etc., Co.*, 105 Fed. 160.

28. Transfer to irresponsible third person.—*Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179; *Germania Nat. Bank v.*

treated as a shareholder within the meaning of the statute.²⁹ Where the stock stood in the name of a third person, a mere pencil memorandum over his name in the stock ledger of the pledgee's name, has no tendency to prove ownership in another than the registered owner.³⁰

§ 248 (4f) Pledgee Forced by Failure of Pledgor into Position of Ownership.—The statute was not intended to impose a liability upon a pledge, who had taken the shares as collateral security and, through the failure of the pledgors, had been forced against his will into the position of ownership. Such a result might operate to destroy altogether the possibility of raising money upon the deposit of national bank shares as collateral.³¹

Case, 99 U. S. 628, 25 L. Ed. 448; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Baker v. Old Nat. Bank*, 86 Fed. 1006.

Transfer to employee of pledgee.—A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intentions, by causing the stock to be transferred into the name of an employee who holds for the benefit of all parties interested. *Higgins v. Fidelity Ins., etc., Co.*, 46 C. C. A. 509, 108 Fed. 475, affirmed in *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

A corporation which receives shares of national bank stock in pledge, with power to use and sell, and which, in good faith, without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employees, merely because it is unwilling they should stand in the name of the original owners, remains a mere pledgee, and is not liable, as a shareholder, to assessment on the stock. *National Park Bank v. Harmon*, 25 C. C. A. 214, 79 Fed. 891; *Baker v. Old Nat. Bank*, 86 Fed. 1006.

In *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525, the certificate was issued to a porter in the employment of the pledgee company, and this although the transfer had been thus made for the purpose of avoiding liability which might be incurred by the shareholders of the bank, in case of insolvency. In the course of the opinion, Mr. Chief

Justice Waite, speaking for the court, recognized that the real owner might be held liable as a shareholder, but in that case the facts showed the company, sought to be held as a shareholder, was never other than a pledgee, and that notwithstanding the transfer to the irresponsible person, the real ownership of the stock remained in the original holder. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

The creditors were not injured, since if the exact truth had appeared upon the face of the certificates, by registering the shares as pledgee, they would have had no recourse against the defendant. Upon the other hand, if defendant had really owned the shares, it would have been a fraud to list them in the name of another. Perhaps it would have been less open to criticism to have listed them in its own name as pledgee, but as its failure to do so under the theory of the defendant that it was in fact the pledgee, misled no one, it should not be held liable for what was done in good faith and with no intent to defraud. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

29. *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; *Harmon v. National Park Bank*, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877.

30. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

31. Pledgee forced by failure of pledgor into position of ownership.—*Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

Where plaintiff relies chiefly upon the fact that defendant, in its correspondence with the bank, spoke of itself as owning or holding the shares

Entries made by the assignees of the pledgors of national bank stock in their account filed to their trust, as to said stock having been converted by the pledgee, being a mere assertion of fact made by these assignees without the knowledge of the defendant, the pledgee, will not bind the pledgee. The company could not be bound by a statement thus made by these assignees without its knowledge or acquiescence. Again, it was obviously untrue, as the stock had never been sold. Evidently all that was intended by the word converted was that the stock was not worth enough to pay the debt for which it was pledged.³²

§ 248 (4g) Pledgee Becoming Real Owner of Stock.—A pledgee of stock in a national bank who becomes the real owner thereof by sale and purchase in accordance with the lien of the pledge is liable for an assessment thereon on the subsequent failure of the issuing bank, in which case it makes no difference in what name the stock stands;³³ but a pledgee of stock of a national bank, who sells it in accordance with the terms of the pledge, and becomes the purchaser, at a nominal price the stock really remaining the property of the pledgor and who never has it transferred on the books of the bank, is not liable for an assessment made under Rev. St., § 5151, on the bank's insolvency.³⁴

standing in the name of such person under the circumstances, it is entirely possible that the word "owner" may have been used in its ordinary sense, or as representing a pledgee upon whom the ownership of the shares had been cast by the failure of the pledgor, and the depreciation of the value of the shares to an amount insufficient to pay the note. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

32. Evidence as to ownership.—*Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

33. Pledgee becoming real owner of stock.—*Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

Hulitt v. Ohio Valley Nat. Bank, 69 C. C. A. 609, 137 Fed. 461, judgment affirmed *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

The pledgee of national bank stock as collateral security for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner of such stock, and, as such, subject to the liability of a stockholder under Rev. St. U. S. §

5151 [U. S. Comp. St. 1901, p. 3465], where, after the death of the pledgor, it causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgor's administrator, who allows the claim in this form. Judgment, *Hulitt v. Ohio Valley Nat. Bank*, 69 C. C. A. 609, 137 Fed. 461, affirmed. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

34. Robinson v. Southern Nat. Bank, 36 C. C. A. 584, 94 Fed. 964, affirmed in 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

A bank which receives as collateral security for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

§ 248 (4h) National Bank a Pledgee.—A national bank which had accepted by way of pledge or collateral security for a loan and caused to be transferred to it, shares of stock of another national bank, is, on the latter's becoming insolvent, liable to an assessment as a stockholder,³⁵ but it is not liable where the transfer is to the bank "as pledgee,"³⁶ and where the stock was never transferred at all, but remains in real owner's name, no question of the bank's liability can arise.³⁷ Where the pledgee bank becomes the real owner although never receiving a transfer, either by purchase under a sale of the pledge or by application of the value of the stock to the debt with the consent of the pledgor, the bank is liable as a stockholder.³⁸

§ 248 (5) Liability of Married Women.—A married woman, who was a stockholder in a national bank at the time it became insolvent, is subject to the statutory liability for an assessment to the amount of her

35. National bank pledgee.—A loan of money by a national bank on such security is not prohibited by law; and, if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom. A colorable transfer of the stock to another will not change the rule. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448, cited and approved in *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553. And see *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

This court has held in *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, and *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, that it is not competent for national banking associations to invest any portion of their capital permanently in the stock of another corporation, and that they are not estopped from setting up such want of power against suits to enforce liability for assessments made by the comptroller of the currency. While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced (a proposition which we withhold from decision), there is a presumption in such cases against any intention on the part of the leading bank to become an owner of the collateral shares. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

36. Transfer to bank "as pledgee."—*Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383. See *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

37. Stock never transferred to bank.—The conceded facts in the case being that the one hundred and eighty shares of the stock embraced in the assessment were the property of C., in whose name they were registered on the books of the bank, and who held the certificates therefor; that the certificate were deposited with the defendant bank as collateral; but that the stock remained in the name of C., and so continued to be at the time of the bringing of this suit, it, therefore, follows that the case is not one in which the defendant bank is estopped by having assumed an apparent ownership of the stock. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

38. Where the pledgee bank becomes the real owner of the stock lawfully, by foreclosure or satisfaction of a debt it is liable to assessment as a stockholder. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

Where shares of national bank stock were pledged with a national bank as security for a loan, with power of sale, and pledgor died, and, after having the shares transferred to an irresponsible employee of the bank, in-

stock,³⁹ at least in the absence of any state statute disabling her from owning

stead of selling the stock, the bank, in executing the authority conferred, indorsed what it deemed the value of the stock, as of the date of the credit, upon the note, and, reduced by the amount of this valuation, presented the note to the administrator, who must have allowed the claim in this form, as it is specifically stated that the subsequent dividends upon the claim were paid to the bank, by this transaction the bank became the real owner of the stock, and is liable as such. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

If the pledgor's representative could have objected to the form in which the bank liquidated the pledge, he did not do so, but accepted the bank's method of divesting him of title by allowing the claim with the credit upon it. The bank thus became the beneficial owner of the stock, and had the national bank continued solvent it certainly could not have denied to the pledgee after this transaction the rights and privileges of a stockholder. *Ohio Valley Nat. Bank v. Hulitt*, 204 U. S. 162, 51 L. Ed. 423, 27 S. Ct. 179.

Bidding in stock at nominal price.—But by the mere act of bidding in the stock held as a pledge at a nominal price, when put up for sale, a national bank should not be regarded as having subjected itself to liability as the real owner thereof. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

When it was decided, in the suit on the note, that the bank did not, by bidding in the stock at the auction sale for a nominal price, cease to be the pledgee, and that the stock remained the property of pledgor, the receiver, as respects that question, is in no better position. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

Whether it was competent to get at the intention of the bank officer in bidding in this stock at a nominal price, by examining one of such officers, might not be clear, if this were a contest between pledgor and pledgee. In the present case the question was an immaterial one, particularly as the case was not submitted to the jury, and as the other undisputed facts of the case showed that, as matter of law, the bank was not, in any proper sense, the real owner of the stock. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

It having been finally adjudicated between the lending banks and the pledgors of the stock that there had been no conversion of the stock as alleged, and that the bank, having waived its right as purchaser thereof, the stock has been decreed to be the property of pledgors, subject to the payment by them of the judgment in favor of the bank, as between those parties, then, it cannot be pretended that the bank is under any legal or equitable obligation to the owners or pledgors to assume or answer for the assessment made by the comptroller on the stock. Having denied the validity of the auction sale, and forced an issue on that question, they cannot now, after a decision in their favor as respects the ownership of the stock, be heard to allege that the stock is really owned by the bank, and that the owner in whose name they stand has been released from his liability as a shareholder. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 308, 45 L. Ed. 536, 21 S. Ct. 383.

39. Liability of married woman.—*Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290. See, also, *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 396, 9 S. Ct. 242.

Assuming that a married woman was not incapacitated from becoming the owner of stock in a bank, and that she was a shareholder in the savings bank, she became, upon the conversion of that bank into a national bank, a shareholder in the latter. *Rev. Stat.*, § 5154. In that event she became, by force of the statute, individually responsible to the amount of her stock, at the par value thereof, for the contracts, debts and engagements of the national bank equally and ratably with other shareholders. Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290, reaffirmed in *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

"The only persons holding shares of national bank stock, whom the statute exempts from this personal responsibility, are executors, administrators, guardians, or trustees. Section 5152. It is not for the courts, by mere construction, to recognize an exemp-

the stock in her own right,⁴⁰ and there may be a personal judgment against her.⁴¹ A married woman who holds stock in a national bank can claim no immunity from assessment on the ground that she had no legal capacity to contract.⁴² The liability of a shareholder in a national bank to assessment to the amount of his stock therein is not contractual but statutory,⁴³ or one on a promise to pay the debt or answer for the deposit on liability of another,⁴⁴ so as to exempt a married woman.

tion which congress has not given. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common-law rights of the husband, in respect to its alienation, cannot control the interpretation of the statute. Such considerations are more properly for the legislative department." *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

A married woman who owns stock in a national bank is not exempt, on account of her coverture, from the liability imposed by the national currency acts upon all stockholders in such banks. *Anderson v. Line*, 14 Fed. 405.

40. *Christopher v. Norvell*, 67 C. C. A. 438, 134 Fed. 842, affirmed in 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

Married women, who are permitted by the laws of the state in which they reside to become shareholders in national banks, are liable to assessments thereon under the national banking laws. In *re First Nat. Bank*, 49 Fed. 120.

Florida.—Nothing in the law of Florida disables married women from owning in their own right stock in national banking associations, and from incurring the liabilities resulting therefrom. *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

41. Personal judgment.—The coverture of the inheritor of shares of bank stock, transferred to her on the books of the bank and treated by her as her property at the time her name was placed on the books of the bank as a shareholder as well as when she received the certificate of stock, did not protect her against a personal judgment at law for the amount due under the assessment made by the controller of the currency, to pay its liabilities under § 5151, Rev. Stat., U. S., although the law of the state of her domicile forbade a married woman to contract. *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

The coverture of the defendant does not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, within the meaning of the statute, a shareholder in the bank at the time of its suspension. But the question as to what property may be reached in the enforcement of such judgment was not decided. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

42. Capacity to contract.—*Witters v. Sowles*, 32 Fed. 767.

The contracts of a bank are not contracts of the individual stockholders; and where an assessment was made upon the shareholders of a national bank to satisfy a contractual liability, a married woman who held stock in such bank could claim no immunity from the assessment on the ground that she had no legal capacity to contract. *Witters v. Sowles*, 32 Fed. 767.

43. Statutory and not a contractual liability.—The liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he or she may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739; *Whitman v. National Bank*, 176 U. S. 559, 44 L. Ed. 587, 20 S. Ct. 477; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419. But that fact does not justify the contention that an action upon an assessment made by the controller is not based upon the statute, but was upon a contract, which, by the laws of Florida, she was incapable of making.

44. Promise to pay debt, etc., of another.—The liability of a shareholder in a national bank, under Act

Manner of Acquisition.—Rev. St., § 5151, providing that shareholders of national banks shall be responsible “for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein,” applies to a married woman who is such a shareholder, without regard to the manner in which the stock was acquired.⁴⁵

Legatee of Shares.—The coverture of the legatee of shares of stock in a national bank when her name was placed upon the bank’s books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the comptroller of the currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise.⁴⁶

Shares Transferred to Wife by Husband.—Where one residing in Maryland subscribes for stock of a national bank of another state, and then transfers it to his wife, also a resident of Maryland, she becomes owner thereof, and is subject to stockholders’ liability, under Rev. St. U. S., § 5152, without regard to the laws of the other state relative to contract by married women.⁴⁷ If a married woman to whom shares of national bank stock were transferred by her husband, became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the bank, as fully as if the transfers had been made originally with her knowledge and consent. Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them, or either of them, she is estopped to say that she did not know their contents, and was not the owner of the shares of stock upon which dividends were declared; for each check discloses upon its face that it was payable to her order, and was for dividends on stock standing in her name on the books of the bank. This result is not

1864, § 12, to the extent of the amount of his stock therein, is not one on “a promise to pay the debt or answer for the default or liability of another,” within Rev. St. N. J. 1874, § 5, relating to the liability of married women, so as to exempt a married woman from liability as a shareholder. *Hobart v. Johnson*, 8 Fed. 493, 19 Blatchf. 395.

45. Manner of acquisition.—*Witters v. Sowles*, 32 Fed. 767; S. C., 35 Fed. 640, 1 L. R. A. 64.

Defendant was a shareholder in a savings bank when it was converted into a national bank. By Rev. St., § 5154, she became, on the conversion, a shareholder in the national bank. Section 5151 imposes individual responsibility on the shareholders, to the

amount of their stock, for debts, contracts, etc., and makes no exception in favor of married women. Section 5152 makes certain exceptions, not including married women. Held, that the fact that defendant was a married woman at the time of the transfer of stock, and also at the time the bank failed, did not exempt her from liability. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

46. Legatee of shares.—*Judgment*, 67 C. C. A. 438, 134 Fed. 842, affirmed. *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

47. Shares transferred to wife by husband.—*Kerr v. Urje*, 86 Md. 72, 37 Atl. 789, 38 L. R. A. 119, 63 Am. St. Rep. 493.

at all affected by the fact that the proceeds of the checks went to the credit of the husband's account. If the defendant endorsed the checks in blank or to the order of her husband, and delivered them to him, the mode in which he disposed of the proceeds is of no consequence in the present suit.⁴⁸

Same—Intention of Husband.—The intent with which the husband caused the transfers to be made to his wife was wholly immaterial. Even if the object was to conceal his property from creditors, the vital question remained whether the defendant became the owner of the stock within the meaning of the statute regulating the individual liability of the shareholders of national banking associations. In other words, the husband may have intended to commit a fraud upon his creditors, and the transfers of stock may have been made to the wife without first obtaining her consent; and yet she may have been, at the time of the bank's failure, liable to be assessed as a shareholder.⁴⁹

§ 248 (6) Deceased Stockholders—§ 248 (6a) Liability of Estate in Hands of Executor or Administrator.—The statutory liability of a stockholder in a national bank survives as against his personal representatives.⁵⁰ National bank stock in the hands of an executor or admin-

48. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290; *Christopher v. Norvell*, 67 C. C. A. 438, 134 Fed. 842, affirmed in 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

In an action by the receiver of an insolvent national bank against a shareholder, to recover an assessment made by the comptroller of the currency, where defendant contended that she did not own stock; that transfers to her on the books were made without her knowledge; and that checks for dividends which were apparently indorsed by her were not signed with knowledge of their contents—the question of fraud in procuring the transfers and indorsements is immaterial, and instructions based thereon are erroneous, since defendant is liable if she learned of the transfers after they were made, and received dividends, or in any way acquiesced therein, and if she signed the checks she is estopped from asserting that she was ignorant of their contents, or was not the owner of the stock on which the dividends were declared. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

If defendant indorsed the checks over to her husband, or indorsed them in blank, it is entirely immaterial that their proceeds went to the husband's account as consul general. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

49. **Intention of husband.**—*Keyser v.*

Hitz, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

50. **Survival of liability.**—*Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Under the National Banking Act, the individual liability of the stockholders is an essential element of the contract by which the stockholders become members of the corporation; and therefore the obligation survives as against the personal representatives of a deceased stockholder. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

"In *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419, the stockholder, while the stock was yet owned by him and stood registered in his name, died intestate, and the stock was distributed to the widow and heirs by decree of the probate court. Shortly thereafter the bank became insolvent and the receiver brought suit against the widow and children for an assessment. The defendants were held to be liable upon the ground that the obligation of a subscriber of stock is contractual in its nature, and is not extinguished by death, but, like any other contract obligation, survives and is enforceable against the estate of the stockholder, notwithstanding that the estate of the decedent had been settled and fully administered according to law, and that the insolvency of the

istrator is liable to an assessment upon liquidation of the bank, under Rev. St., §§ 5151, 5152, making the shareholders of national banks responsible equally, and estates in the hands of executors liable in like manner and to the same extent as the testator would be if living,⁵¹ the bank having become insolvent after the death of the stockholder,⁵² and the stock not having been transferred at the date of the comptroller's order.⁵³

Effect of Provision Relieving Executor or Administrator from Personal Liability.—The liability of a deceased stockholder's estate for assessments made on the stock by the comptroller, is not affected by the provision of § 5152, Rev. Stat., that persons holding national bank stock as executor or administrator shall not be personally liable.⁵⁴

Duration Generally.—The liability of the estate of a deceased stockholder in a national bank continues, at least, until his stock is transferred to another on the books of the company, or until such a transfer is rightfully demanded.⁵⁵

Shares Issued to Executor upon Reduction of Stock.—Under Rev. St., § 5152 (U. S. Comp. St. 1901, p. 3465), providing that funds in the hands of an executor shall be liable for assessment on corporate stock to the same extent as the testator would be if living, an executor is liable as

bank occurred after the death of the intestate. Citing *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The statutory liability of a stockholder in a national bank survives his death, whether the corporate indebtedness was incurred before or after his death, and whether the corporation becomes insolvent before or after his death. The stockholder's contract does not contemplate a hiatus in liability resulting from his death. *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

51. Stock in hands of executor or administrator.—*Witters v. Sowles*, 25 Fed. 168; *Wickham v. Hull*, 60 Fed. 326.

An executor who receives certificates of national bank stock as part of the assets of decedent's estate, and includes them in his inventory returned to the probate court, is a shareholder, and liable as such for an assessment, under Rev. St., § 5151, subject to the relief granted by section 5152. *Parker v. Robinson*, 18 C. C. A. 36, 71 Fed. 256.

52. Insolvency of bank after death of stockholder.—*Wickham v. Hull*, 60 Fed. 326; *Davis v. Weed*, Fed. Cas. No. 3,658, 44 Conn. 569; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

The estate of a deceased owner of national bank stock is liable (Rev. St., § 5152) to an assessment levied against his executors or administrators in consequence of the failure of the bank after his death. *Wickham v. Hull*, 60 Fed. 326.

53. Stock not transferred at date of comptroller's order.—A receiver of an insolvent national bank has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock had not been transferred at the date of the comptroller's order making the assessment. Rev. St., § 5152. *Davis v. Weed*, Fed. Cas. No. 3,658, 44 Conn. 569.

54. Effect of provision relieving executor or administrator from personal liability.—*Davis v. Weed*, Fed. Cas. No. 3,658, 44 Conn. 569.

Section 5152, Rev. St., relative to national banks, was designed to protect persons who hold stock in a representative capacity from any personal liability, and only makes the funds in the hands or under the control of such representative liable. The liability of the shareholder survives against his estate. *Irons v. Manufacturers' Nat. Bank*, 21 Fed. 197.

55. Duration generally.—*Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416.

such for assessments made by the comptroller on shares of stock in a national bank held by him, and issued to the estate of his testator in exchange for shares held by the testator in his lifetime, and surrendered by the executor on a reduction of the capital stock of the bank.⁵⁶

As between Executor and Residuary Legatee.—As between an executor and a residuary legatee, the liability upon shares of stock in a national bank which was contingent in the lifetime of the owner, but becomes fixed during the course of administration, should be charged upon the assets of the estate, where the residuary legatee has not yet either title, possession or control of the estate. There is no ground on which the receiver could bring suit against him; and if he were to obtain judgment it must then be competent to seize the property of the legatee, which might happen before it is certain whether he gets anything substantial from his legacy or not.⁵⁷

Estate Not Fully Settled—Executor or Administrator Sole Heirs of Legatee.—An executor and residuary legatee of a deceased stockholder of an insolvent national bank who has failed to transfer such stock to himself or any other person, cannot claim exemption from liability, in his representative capacity, for assessments on such stock to the extent of the value of any assets of the estate remaining subject to his control. Where an executor assumes to carry out the provisions of a will in settling up the estate of the decedent without other authority than the will itself, exemption from liability incident to the ownership of national bank stock which belonged to the deceased in his lifetime can not be claimed until the title to all personal property of the deceased has been transferred and until the heirs have obtained possession of all real property.⁵⁸ Where an administrator, who is also sole heir and next of kin of his intestate, takes into his possession bank stock belonging to the intestate, votes such stock, and draws the dividends thereon, but does not have the stock transferred to his name, he does not thereby become personally liable as owner of the stock before his duties as administrator are ended.⁵⁹

56. Shares issued to executor upon reduction of stock.—*Brown v. Ellis*, 103 Fed. 834.

57. As between executor and residuary legatee.—*Tourtelot v. Finke*, 87 Fed. 840.

An executrix, who is also the sole devisee and legatee under a will, does not acquire title to national bank stock constituting part of the estate, so as to prevent the estate from being liable to an assessment made by the comptroller of the currency, merely by the fact of having paid or secured all the debts owing by decedent, the estate still remaining unsettled. *Tourtelot v. Finke*, 87 Fed. 840.

58. Estate not fully settled—Executor or administrator sole heirs or legatee.—*Baker v. Beach*, 85 Fed. 836.

The widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, cannot, on the ground that the estate is fully settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control. *Baker v. Beach*, 85 Fed. 836.

59. Modifying 57 Hun, 586, 10 N. Y. S. 325. In re Bingham, 127 N. Y. 269, 27 N. E. 1055.

The estate of an administrator, who in that capacity held stock in a national bank, and never had it transferred to himself, though he was the sole heir of intestate, is not liable to

§ 248 (6b) Liability of Devisee and Legatee or of Heir and Distributee.—See ante, "Liability of Estate in Hands of Executor and Administrator," § 248 (4a).

Liability of Legatee of Stock.—Where bank stock is bequeathed to one for life, with remainder over, an assessment made after the death of the testator is payable by the beneficiaries of the bequest, and testator's estate cannot be made liable therefor.⁶⁰

Stock Transferred to Residuary Legatee.—Stock in a national bank belonging to the estate of a deceased stockholder, which the executor transferred to the residuary legatee under an order of distribution, is no longer the property of the estate for the purpose of assessment.⁶¹

Liability of Heir and Distributee to Whom Stock Allotted.—The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable, under Rev. St. U. S., §§ 5139, 5151, 5152, to assessments on the stock in case the bank subsequently becomes insolvent.⁶² Enforcing the whole amount of an assessment on na-

an assessment on it, under Rev. St. U. S., § 5152, providing that persons holding stock as administrators shall not be personally subject to any liability as stockholders. In *re* Faulkner, 57 Hun 586, 10 N. Y. S. 325. Judgment modified, 127 N. Y. 296, 27 N. E. 1055.

"The residuary interest in the stock after payment of the debts of his intestate belonged to him; but while he held the relation of administrator, which he could terminate only through a final judicial settlement of his accounts, it is not seen how he could be treated as having the legal title to the stock other than in his representative capacity." In *re* Bingham, 127 N. Y. 269, 27 N. E. 1055.

60. Liability of legatee.—Blackmore *v.* Woodward, 18 C. C. A. 57, 71 Fed. 321.

61. Stock transferred to residuary legatee.—Dent *v.* Matteson, 70 Minn. 519, 73 N. W. 416. See ante, "Liability of Estate in Hands of Executor or Administrator," § 248 (6a).

An executor transferred national bank stock belonging to his testator to the residuary legatee under an order of distribution which did not specifically mention the stock. A receiver was afterwards appointed for the bank, who made an assessment on the executor for these shares. Held, that the stock was no longer the property of the estate for the purposes of assessment. *Witters v. Sowles*, 25 Fed. 168.

62. Liability of heir and distributee to whom stock allotted.—Judgment, Dent *v.* Matteson, 73 Minn. 170, 75 N. W. 1041, affirmed. *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

After the estate of a deceased stockholder of a national bank was administered upon, and the assets, including the bank stock, distributed, the bank became insolvent, and a receiver was appointed. The stock was never transferred on the books of the bank to the administrator or distributees. In an action by the receiver under Gen. St. Minn. c. 77, to recover of the distributees, to the extent of assets received by them, the amount of an assessment on stockholders, under Rev. St. U. S., § 5151, held, that as the claim was a contingent one, and did not become absolute until the bank had become insolvent, and this was after the time to file claims against the estate had expired, the action can be maintained, notwithstanding Rev. St. U. S., § 5152, providing that "persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or persons interested in such trust fund would be, if living." Dent *v.* Matteson, 70 Minn. 519, 73 N. W. 416.

tional bank stock, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate, pursuant to Gen. St. Minn., 1894, § 5918, et seq., does not violate any rights under the federal statutes.⁶³

Liability of Assets Transferred to Devisees and Legatees.—Under Rev. St., § 5151, rendering shareholders individually responsible for the liabilities of a national bank to the extent of the value of their stock; and section 5152, providing that the estate of shareholders in the hands of the executor shall be liable in like manner and to the same extent that the testator would be if living,—assets which have been transferred to devisees or legatees cannot be subjected to liabilities of the bank accruing after the transfer;⁶⁴ aliter as to assets not delivered till after the insolvency of the bank.⁶⁵

§ 248 (7) Estoppel to Deny Liability of Shareholder.—An individual can so act as to be estopped from saying he is not a shareholder in a national bank and liable as such for the contracts, debts and engagements of the bank.⁶⁶ A person who knowingly permits his name to be entered upon the stock books of a national bank as the owner of stock therein is estopped to deny that he is the owner in an action to enforce his shareholder's liability.⁶⁷ Such notice as is afforded by the words "collateral,"⁶⁸ "in escrow,"⁶⁹ "pledgee,"⁷⁰ "trustee,"⁷¹ or "agent,"⁷² on the bank's books in describing the holder prevents estoppel.

Subscription Induced by Fraud.—A subscription to the stock of a national bank, though induced by false representations of its officers, is not

63. Judgment, *Dent v. Matteson*, 73 Minn. 170, 75 N. W. 1041, affirmed in *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

64. **Liabilities of assets transferred to devisees and legatees.**—*Witters v. Sowles*, 32 Fed. 130, 24 Blatchf. 550.

65. **Assets not delivered till after insolvency.**—On the representations of the executor that he had more than sufficient assets in his hands to satisfy all debts and legacies, he was decreed to pay defendant S. S. her legacy, but neglected to do so until after the failure of the national bank in which the testator was a stockholder, when he delivered property to her trustee in satisfaction of the legacy. Held, that the legatee and her trustee were chargeable with an assessment upon testator's stock to meet the liabilities of the bank accruing before actual delivery to the legatee. *Witters v. Sowles*, 32 Fed. 130, 24 Blatchf. 550.

66. **Estoppel to deny liability as shareholder.**—*Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National Ger-*

man-American Bank, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

67. *Lewis v. Switz*, 74 Fed. 381; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Consent to transfer by transferee.—See post, "Liability of Transferee," § 249 (3).

68. **"Collateral."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006; *National Park Bank v. Harmon*, 25 C. C. A. 214, 79 Fed. 891.

69. **"In escrow."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006; *Welles v. Larabee*, 36 Fed. 866, 2 L. R. A. 471.

70. **"Pledgee."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, 2 S. Ct. 10.

71. **"Trustee."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006; *Thurber v. Cecil Nat. Bank*, 52 Fed. 513.

72. **"Agent."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006.

void, but voidable only, at the election of the subscriber; and where he continues for years, and until the bank has been placed in liquidation, to remain and act as a stockholder, and to receive dividends as such, though without knowledge of the fraud, or means of ascertaining it, he cannot then exercise his option to rescind the contract of subscription as against the bank's creditors, whatever his rights might be as against the corporation.⁷³

Subscriber for Increased Issue.—Where the capital of a national bank has been increased, and defendants have received their additional stock, and for several years held themselves out as stockholders, they cannot deny their liability upon the ground that the increase of capital was fraudulent, and that they could not have discovered the fraud with ordinary care.⁷⁴

Same—Subscriber Receiving Original Instead of Increased Issue.—Where one subscribes for part of an increased issue of national bank stock, but actually receives original stock instead, and holds it for several years, receiving dividends and paying assessments thereon, he will be liable, upon failure of the bank, to assessment on such stock by the comptroller of the currency.⁷⁵ But it has been held that the fact that the subscriber for the new shares received a dividend on the old shares so transferred to him, without his knowledge or consent, does not estop him from denying his liability as a shareholder, where such dividend was received in the belief that it was paid to him by virtue of his subscription to the new stock.⁷⁶

Purchase at Sale by Bank of Its Own Stock.—The sale which § 5201, Rev. St., requires a national bank to make of its own stock, is real, and not fictitious. And where the president and cashier of a national bank, which is the owner of some of its own stock, purchases such stock, and execute their note to the bank for the purchase money, in a suit against them on the note, by the receiver of such bank, they are estopped to set up as a defense that their purchase of the stock was unauthorized, or merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose.⁷⁷

73. Subscription induced by fraud.

—*Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843, affirmed in *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585. See post, "Defenses and Facts Relieving from Liability," § 250 (3b).

74. Subscriber for increased issue.

—*Latimer v. Bard*, 76 Fed. 536.

75. Same—Subscriber recovering original instead of increased issue.—*Rand v. Columbia Nat. Bank*, 87 Fed. 520.

Subscribers to the capital stock of a national bank previously organized and carrying on business, who accepted certificates of stock representing a portion of the original capital stock, obtained by the bank in some manner from the former holders, are estopped,

after the lapse of five years, during which they retained the stock, received two dividends, and paid one assessment thereon, to deny that they are stockholders, in a suit by the receiver to collect a further assessment, on the bank's insolvency, on the ground that they supposed they were purchasing a part of an issue of increased stock which the bank had voted to issue, but the issuance of which had not then been authorized by the comptroller. *Rand v. Columbia Nat. Bank*, 36 C. C. A. 292, 94 Fed. 349.

76. Stephens v. Follett, 43 Fed. 842.

77. Purchase at sale by bank of its own stock.—*Bundy v. Jackson*, 24 Fed. 628.

Uncancelled Surrendered Certificates Hypothecated by President Creating Overissue.—Purchasers of stock of a bank from the president thereof, at a time when there was no overissue, and when the amount purchased was credited to him on the books, which, at the time or shortly afterwards, was, by his direction, transferred from his account to theirs on the stock journal and stock ledger and new certificates were issued to them, and who were thereafter treated by the bank as the lawful owners of the stock, and were allowed to vote the same and receive dividends thereon; are estopped after the failure of the bank and suit brought to collect an assessment made against them as shareholders from claiming that they were not stockholders, although the president neglected to cancel the old certificates, and afterwards hypothecated part of them, thereby creating an overissue.⁷⁸

Trustee.—One who knowingly permits his name to be entered upon the stock books of a national bank as the owner, individually, of stock therein, cannot be permitted, as against creditors, or a receiver of the bank representing them, to show that he was not the owner of the stock; and he is liable for the assessment thereon, though he held the stock, in fact, as trustee⁷⁹ for another person⁸⁰ or for the bank itself.⁸¹

Pledgee.—It is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests.⁸² A pledgee of national bank stock who knowingly permits his name to be entered upon the stock books of the bank, as the owner, individually, of the pledged shares, is estopped, upon principles of fair dealing, as against creditors, or a receiver of the bank representing them, from asserting that he was not in fact owner of the stock; and he is liable for an assessment thereon.⁸³ Such notice as is afforded by the words "collateral"⁸⁴ or "pledgee"⁸⁵ on the bank's books describing the holder prevents an estoppel.

Holder Described as Cashier.—Where national bank stock was carried on its books in the name of an individual described as cashier of a certain

78. **Uncancelled surrendered certificates hypothecated by president creating overissue.**—*Burt v. Bailey*, 19 C. A. 651, 73 Fed. 693.

79. **Trustee.**—*Lewis v. Switz*, 74 Fed. 381; *Horton v. Mercer*, 18 C. C. A. 18, 71 Fed. 153.

80. Defendant purchased bank stock with his own means, held it for a year, and collected and appropriated all dividends thereon, and, when notified by the bank that the stock stood in his name on the books, gave no notice that he held it in trust for another person, but permitted the bank to deal with him as the beneficial owner, and did not tender the stock to or demand reimbursement from any other person. Held, that he was estopped to claim, after the insolvency of the bank, that

he held the stock merely as trustee for another. *Horton v. Mercer*, 18 C. C. A. 18, 71 Fed. 153.

81. *Lewis v. Switz*, 74 Fed. 381.

82. *Frater v. Old Nat. Bank*, 42 C. C. A. 133, 101 Fed. 391.

83. *Baker v. Old Nat. Bank*, 86 Fed. 1006.

84. **"Collateral."**—*National Park Bank v. Harmon*, 25 C. C. A. 214, 79 Fed. 891; *Baker v. Old Nat. Bank*, 86 Fed. 1006.

85. **"Pledgee."**—*Baker v. Old Nat. Bank*, 86 Fed. 1006; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525; *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

other bank, neither the latter bank nor the individual is estopped from setting up that they hold the stock merely as pledgees.⁸⁶

Whether Claim of Ownership an Estoppel a Question for Jury.—

Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock was retained, is a question for the jury.⁸⁷

Transfer to Holder to Secure Unpaid Debt to Third Person.—

Where, in an action by the receiver of a national bank to recover an assessment from one in whose name a certificate of stock had been issued, but who it was shown held the same only as trustee to secure an unpaid indebtedness from the actual owner of the stock to a third person, the plaintiff did not produce in evidence the list of stockholders required by Rev. St., § 5210 [U. S. Comp. St. 1901, p. 3498], to be kept by the bank, or show whether or not such list was in fact kept, but relied solely on the stock certificate book, all persons must be held to have been chargeable with notice of all the facts in regard to such stock therein shown; and, conceding that defendant's liability could be established by such book alone, without producing or accounting for the list of stockholders, it is insufficient to create an estoppel which would prevent him from showing the facts where it appears therefrom that the stock was transferred to him by one to whom the previous certificate had been issued as pledgee.⁸⁸

§ 248 (8) Failure of Some Stockholders to Pay Assessments.—

Under the national banking act (Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3465]), requiring that the shareholders of every national bank shall be held individually responsible, equally and ratably, and not one for another, for all debts of the bank, to the extent of the amount of their stock, at the par value thereof, in addition to the amount invested in such stock, a stockholder cannot be required to make good the failure of another stockholder to pay his assessment; and, where an assessment has been made, it must be considered, for the purpose of making a second assessment, as if the entire assessment had been paid.⁸⁹ The liability of the stockholder is several, and

86. Holder described or "Cashier."

—*Baker v. Old Nat. Bank*, 86 Fed. 1006.

Where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership. *Frater v. Old Nat. Bank*, 42 C. C. A. 133, 101 Fed. 391.

87. Whether claims of ownership an estoppel a question for jury.—

Judgment, *Higgins v. Fidelity Ins., etc., Co.*, 46 C. C. A. 509, 108 Fed. 475, affirmed. *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

88. Transfer to holder to secure unpaid debt to third person.—*Tourtlot v. Stolteben*, 101 Fed. 362.

89. Failure of some stockholders to pay assessments.—*Lease v. Barschall*, 106 Fed. 762. See post, "Defenses and Facts Relieving from Liability," § 250 (3b).

"It is for the purpose of maintaining insolvency of banks that the sol-

is not affected by the failure of any other shareholder to pay the amount assessed against him,⁹⁰ and, therefore, no further assessment can be made to supply a deficit caused by the inability of the receiver to enforce payment from such stockholders as are insolvent or beyond the jurisdiction.⁹¹

§ 248 (9) Liability for Interest.—An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable.⁹²

§ 249. — Effect of Transfer of Stock—§ 249 (1) Liability of Transferor—§ 249 (1a) In General.—A stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent, by a bona fide transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud.⁹³

§ 249 (1b) Knowledge of Insolvency and Intent to Evade Liability.—To establish the liability of a stockholder in a national bank to creditors on its failure, if he has made an absolute sale of his stock, and the same has been transferred on the books, the complainant must establish these propositions: (1) That at the time the stock was transferred the bank was insolvent. (2) That the seller then knew or ought to have known of such insolvency. (3) That the seller made the transfer for the purpose of avoiding the statutory double liability. (4) That the seller failed to show affirmatively that the purchaser of the stock was able to respond to the double liability.⁹⁴ A stockholder in a national bank who knows of its

vent shareholders in a national bank can not be compelled to stand good for the individual liability of the insolvent ones, and that the loss caused by such insolvency must be borne by the creditors of the bank." *Merchants' Nat. Bank v. Wehrmann*, 69 O. St. 160, 68 N. E. 1004.

90. *United States v. Knox*, 103 U. S. 422, 26 L. Ed. 216.

91. Where, in order to discharge the liabilities of an insolvent national banking association, the comptroller of the currency assessed against the several shareholders a sufficient percentage upon the par value of the stock by them respectively held, he has no power to direct a further assessment to supply the deficit caused by the inability of the receiver to enforce payment from such as are insolvent or beyond the jurisdiction. *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

92. **Liability for interest.**—*Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575.

As the liability of the stockholder of a national bank is for the contracts,

debits, and engagements of the bank, and as these would draw interest as against the bank, it is not error to allow interest thereon, as against the stockholders, in enforcing the personal liability of the latter. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

Where the decision of the comptroller to enforce the personal liability of stockholder is communicated to the receiver by a letter from the comptroller, it bears interest from the date of this letter. *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

93. **Liability of transferor.**—*Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646.

Where a sale of stock in a national bank is made in good faith, and the transfer entered on the books of the bank, the transferor is freed from all liability in respect to such share. *Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65.

94. **Knowledge of insolvency and in-**

existing or impending insolvency can not escape liability for assessment under Rev. St., § 5151, by transferring the stock with intent to avoid such liability,⁹⁵ though the transfer is absolute and to a solvent transferee able to pay the assessment.⁹⁶ Under such circumstances the intent with which the transfer is made is material.⁹⁷

tention to evade liability.—*Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646; *McDonald v. Dewey*, 67 C. C. A. 408, 134 Fed. 528.

To establish the liability of a stockholder in a national bank to creditors, on its failure, after he has made an actual out-and-out sale of his stock, and the same has been transferred on the books, although the sale may have been made for the purpose of avoiding liability, three things must concur:

(1) The bank must have been insolvent when the sale was made; (2) the seller must have known such fact, or be chargeable with knowledge of it; and (3) the transfer must have been made to one who was insolvent or unable to respond to an assessment, and whose financial condition was known, or ought to have been known, to the seller. *McDonald v. Dewey*, 67 C. C. A. 408, 134 Fed. 528. Reversed in 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The transferee of national bank stock can not be made liable for an assessment upon the stock on the ground that the bank was insolvent at the time of the transfer, unless he knew of such insolvency, and intended to evade his liability. *Vandagriff v. Rich Hill Bank*, 90 C. C. A. 129, 163 Fed. 823.

95. *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274, affirming 18 C. C. A. 618, 72 Fed. 402.

Facts evidencing collusive transfer.

—In a proceeding in equity by the receiver of a national bank against a former stockholder, alleging a collusive and colorable transfer of his stock to an insolvent in order to avoid personal liability as stockholder, under Act June 3, 1864, c. 106, § 12, it appeared that defendant, having learned of the precarious condition of the bank, in a confidential interview with the officers thereof, immediately made a transfer of his stock of the par value of \$13,000 to the mother of his deceased wife, a person without means, and who, in testifying, was unable to specify any other consideration than an alleged indebtedness for services in the charge of defendant's household for a period of two and a half years, at the rate of \$1,000 per year, for all the stock, which she claimed to have received at fifty

cents on the dollar. Defendant himself was not sworn as a witness. Held sufficient evidence of the collusive character of the transfer, and that the defendant was liable to the receiver for the amount of his stock. *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

96. *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274, affirming 18 C. C. A. 618, 72 Fed. 402.

Facts evidencing transfer to escape liability.—A national bank, having a nominal capital of \$300,000, made such losses that its assets were worth but \$900,000 while its debts aggregated \$1,400,000. It had \$660,600 of bills receivable, over \$300,000 of which were worthless. A director of several years' standing, and the chairman of the finance committee, whose business it was to know the value of the bank's assets, and the amount of its liabilities, who had examined the bank's bills receivable two or three months before a transfer of his stock, who knew that the bank had made heavy losses, and who disliked the management of the bank, and knew that there was no prospect of more dividends, that the capital was impaired, and that the bank held \$136,000 worth of worthless paper, transferred his stock, at a premium of 20 per cent, and on the same day drew over \$10,000 in money on deposit in the bank in his name to pay to the transferee in a trade for a building received, subject to a mortgage of \$30,000, only thirty days before the bank failed. Held, that a finding that the transfer was made for the purpose of escaping individual liability as stockholder was justified. *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402.

97. Intent immaterial.—*Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274.

If the bank is solvent at the time the transfer is made, intent of the seller to avoid the statutory liability is immaterial, as such transfer does not impair the security of the creditors; but if the bank be insolvent, every shareholder who, knowing or being charged with knowledge of its insolvency at the time, transfers his stock, in order to escape such liability, is

Insolvency Unknown to Seller.—An owner of shares in a national bank, who sold the same in good faith, without knowledge or reason to believe that the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, cannot be treated as a shareholder, and held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify it where the seller has exercised due diligence, and has acted in the transaction with fairness and good faith.⁹⁸ A bona fide sale of stock of a national bank, made in the exercise of the power given to stockholders by Rev. St. U. S., § 5139 [U. S. Comp. St. 1901, p. 3461], to transfer their stock "like other personal property," was not void as a fraud on the bank's creditors because the bank was insolvent at the time of the transfer in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.⁹⁹

Director.—The fact that a shareholder in a national bank is a director does not charge him with knowledge of the bank's insolvency;¹ but a director who is also a member of the finance committee is charged with knowledge of its insolvency.²

Transfer after Bank Has Closed Its Doors.—After a national bank has become insolvent and has closed its doors for business, its shareholders' liability to creditors is so far fixed that any transfer of their shares must be held fraudulent and inoperative as against the creditors of the bank.³

none the less liable. *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274.

98. Insolvency unknown to seller.—*Earle v. Carson*, 46 C. C. A. 498, 107 Fed. 639, 60 L. R. A. 266, affirmed in 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254; *Vandagriff v. Rich Hill Bank*, 90 C. C. A. 129, 163 Fed. 823; *Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646.

If a bank is insolvent and its insolvency is unknown to the seller, a transfer divests him of the liability of the stockholder. *Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646.

99. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

The sale and transfer by defendant of stock in an insolvent national bank is not shown to have been with intent to avoid the double liability thereon, and therefore fraudulent, where he did not have knowledge of the insolvency, and his sale was made at the instance of a broker, who made him an offer

for his stock, and apparently to persons who were responsible. *Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646.

1. That a stockholder in a national bank having a capital of \$200,000, at the time he sold and transferred his stock, was a director and was dissatisfied with the management, will not charge him with knowledge of its insolvency, so as to render him liable for a subsequent assessment, though it was in fact insolvent, where its assets on their face largely exceed its liabilities, and it appeared that the directors were deceived as to their value. *Fowler v. Crouse*, 99 C. C. A. 200, 175 Fed. 646.

2. *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274, affirming 18 C. C. A. 618, 72 Fed. 402; *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

3. **Transfer after bank has closed its doors.**—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

Knowledge That Reserve below Legal Requirement.—A transfer of stock of a national bank, made with knowledge of the fact that the reserve of the bank is below the limit fixed by Rev. St. U. S., § 5191 [U. S. Comp. St. 1901, p. 3486], does not create a presumption of bad faith which will avoid the transaction as a fraud on the bank's creditors in the event of the future suspension of the bank, since the statute creates no presumption of inability to continue business as a consequence of a reduction of the reserve below the legal requirement.⁴

Liability to Existing and Future Creditors.—One who, with knowledge of the insolvency of a national bank, transfers his stock to an irresponsible vendee with intent to evade his liability under Rev. St. U. S., § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, can only be held responsible for the unsatisfied debts existing when the fraudulent transfer was made, in view of the requirement of § 5210 [U. S. Comp. St. 1901, p. 3498] that the list of the names and residences of all the shareholders and the number of shares held by each be kept by the bank, subject to the inspection of all shareholders and creditors, and of the provision of § 5139 [U. S. Comp. St. 1901, p. 3461] that every person becoming a shareholder by a transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and that no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.⁵

§ 249 (1c) Capacity and Solvency of Transferee.—To relieve a holder of national bank stock from the obligations imposed by the statute a transfer by him, on the books of the bank, must be to some person capable of succeeding to his obligations.⁶ The insolvency of the purchaser of shares of stock of a national bank which subsequently suspends business does not render the sale void as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller.⁷ A stockholder in a

4. **Knowledge that reserve below legal requirement.**—Judgment, 46 C. C. A. 498, 107 Fed. 639, 60 L. R. A. 266, affirmed *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

5. **Liability to existing and future creditors.**—*McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731, reversing 67 C. C. A. 408, 134 Fed. 528.

6. **Capacity and solvency of transferee.**—*Man v. Cheeseman*, Fed. Cas. No. 9,002a.

7. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254, affirming 46 C. C. A. 498, 107 Fed. 639, 60 L. R. A. 266.

The validity of a transfer of stock in a national bank is tested by the good faith of the seller, and not by the unknown financial condition of the buyer.

And a bona fide sale of shares of stock in a national bank is not void, though the vendee is insolvent if the fact of such insolvency was at the time unknown to the seller. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254, distinguishing *Stuart v. Hayden*, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Matte-son v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Under Rev. St. U. S., § 5151, making shareholders in a national bank liable for the debts of the association, and § 5139, providing for the transfer of shares, with a provision that the transferee shall "succeed to all the

national bank can not evade his liability under Rev. St. U. S., § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, by a transfer of his shares of stock to a person financially irresponsible, provided he knew or should have known at the time that the bank was then insolvent.⁸ To hold liable for an assessment one who has transferred his stock to an irresponsible person, the transferor need not have had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer to relieve himself from liability.⁹

Transfer to Bank Itself.—A transfer of the shares of a stockholder in a national bank to the bank itself will not relieve the holder from his individual liability thereon.¹⁰

Sale to President of Bank.—A shareholder in a national bank, who sold his shares through a broker to the president of the bank, executing a blank transfer, without knowledge of the real purchaser or the insolvency of the bank, and received in payment the broker's check on the bank, which was paid out of the bank's funds, is not liable for the amount to the receiver of the bank, under Rev. St., § 5201, which prohibits the bank or its officers from purchasing its own shares.¹¹

Transfer by Parent to Minor Children.—A transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children, under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency.¹²

§ 249 (1d) Colorable Transfer—§ 249 (1da) In General.—A colorable transfer of shares of stock in a national bank, made for the benefit of the registered owner, can not relieve the latter from his liability under Rev. St. U. S., § 5151 [U. S. Comp. St. 1901, p. 3465], as a shareholder, for the debts of the bank.¹³ The real owner of shares in a national bank

rights and liabilities of the prior stockholders of such shares"—a transfer of stock, though without consideration and to an irresponsible person, can not be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank. *Sykes v. Holloway*, 81 Fed. 432.

8. *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731, reversing 67 C. C. A. 408, 134 Fed. 528.

A stockholder in a national bank, with knowledge that the bank is in a failing condition, cannot make a voluntary transfer of his stock to one financially irresponsible, and thereby escape liability for assessments. *Baker v. Reeves*, 85 Fed. 837.

The transfer of shares of the capital stock of a national bank to an insolvent, made with intent to exonerate

the owner and transferor from liability as a stockholder to creditors, is void as against creditors of the bank. *Bowden v. Santos*, Fed. Cas. No. 1,716, 1 Hughes 158.

9. *Cox v. Montague*, 24 C. C. A. 364, 78 Fed. 845.

10. **Transfer to bank itself.**—*Man v. Cheeseman*, Fed. Cas. No. 9002a.

11. **Sale to president of bank.**—*Johnson v. Laffin*, Fed. Cas. No. 7,393, 5 Dill. 65, affirmed in 103 U. S. 800, 26 L. Ed. 532.

12. **Transfer by parent to minor children.**—*Aldrich v. Bingham*, 131 Fed. 363.

13. **Colorable transfer.**—*McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731, reversing 67 C. C. A. 408, 134 Fed. 528.

can not escape the statutory individual liability by merely transferring the shares on the bank books to another, who becomes merely the nominal owner.¹⁴

§ 249 (1db) Transfer by Executor.—Where an executor without consideration, transfers bank stock in trust for his own benefit, and to enable the transferee to become a director of the bank, the title, for the purposes of assessment, remains with the executor.¹⁵

§ 249 (1e) Transfer on Books of Bank.—A person who appears upon the records of a national bank to be a stockholder at the time the bank becomes insolvent, is subject to statutory personal liability of shareholder, although he has previously, in good faith, sold his stock.¹⁶ To relieve a holder of national bank stock from his liability for the debts of the bank, a transfer by him must be made on the books of the bank; the ordinary method of signing the power of attorney thereon is insufficient.¹⁷

Failure to Perfect Transfer Fault of Bank.—A stockholder in a national bank remains liable to creditors so long as the stock stands in his name on the books, although he may have sold it and delivered the certificate to the purchaser, unless he has done all that he can reasonably do to have the same transferred, by seeing that the certificate is delivered to the bank, with the power of attorney and data to enable the officers to make the transfer.¹⁸

14. *Davis v. Stevens*, Fed. Cas. No. 3,653, 17 Blatchf. 259.

A purchaser of stock in a national bank, who, to conceal his ownership and escape individual responsibility, causes it to be transferred to another person pecuniarily irresponsible, is, so long as he remains the actual owner, a shareholder, and liable as such, within the meaning of Rev. St., § 5151, providing for the individual liability of shareholders for debts of the bank. *Davis v. Stevens*, Fed. Cas. No. 3,653, 17 Blatchf. 259.

15. **Transfer by executor.**—*Witters v. Sowles*, 32 Fed. 130, 24 Blatchf. 550.

National bank stock, which has been transferred without consideration to a trustee by the executor of an unsettled estate, is liable, as in the hands of the executor, to an assessment on liquidation of the bank. *Witters v. Sowles*, 25 Fed. 168.

16. **Transfer on books of bank.**—*Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591, affirmed in 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

A stockholder in a national bank sold certain stocks several months before the insolvency of the bank, but the transfer was not made on the books till the date of the bank's failure. Held, that he did not escape his statutory

personal liability for debts of the bank, the stock being, by Rev. St., § 5139, transferable only on the books of the bank. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

When bank stock is sold, but not transferred on the books of the bank, and the bank afterwards fails, the executors of the person in whose name the stock stood on the books are liable for assessment, although said stock had been paid for by a purchaser buying at the request of the president of the bank, who gave him a cashier's check for that purpose, placing the money so furnished to the credit of said purchaser on the books of the bank as a temporary loan, the intention being ultimately to transfer said shares to a third party, as part of a larger proposed investment in stock, for which funds had been placed in the hands of the president of the bank. *Price v. Whitney*, 28 Fed. 297.

17. *Man v. Cheeseman*, Fed. Cas. No. 9,002a.

18. **Failure to perfect transfer fault of bank.**—*McDonald v. Dewey*, 67 C. C. A. 408, 134 Fed. 528; decree reversed in 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731; *Cox v. Elmendorf*, 97 Tenn. 518, 37 S. W. 387.

Defendant, prior to the failure of a

Recourse on Vendee for Failure to Transfer.—Where a vendor of shares in a national bank, who has been forced to respond to the individual liability attaching to the apparent ownership thereof upon the bank's insolvency, brings action against his vendee for his failure to insert his own name, or that of some other responsible person, in the blank which had been left by them in the transfer they signed on the books of the bank for the stock he had bought, his obligation to vendor, if any there is, grows out of his contract with him as a purchaser, and not out of the banking

national bank in which his son was a director, owned certain shares of the bank's stock, which he sold to his son, receiving in payment a demand note, secured by certain collateral. At the time of the sale the son promised that he would see that the shares were properly transferred, but he failed to do so. Defendant made no attempt to see that the stock was transferred, and it stood in his name on the books of the bank at the time of its failure. Held, that the son was *prima facie* the father's agent to transfer the shares, and that in the absence of proof that the transfer was in good faith, and of a prompt attempt to have the stock transferred on the books of the bank, the father was liable to assessment thereon. *Schofield v. Twining*, 127 Fed. 486.

Certificate delivered to president of bank for transfer.—Defendant, who was the owner of stock in a national bank, which, under its by-laws, was transferable only on the books of the bank, sold the same, and, after executing a written assignment to the purchaser, and a power of attorney in blank to make the transfer, indorsed on her certificate of stock, delivered the certificate to the president of the bank, who promised to make the proper transfer on its books, but failed to do so, though the certificate was thereafter treated and used by the bank as the property of the purchaser. Held, that defendant was not liable as a stockholder. *Cox v. Elmendorf*, 97 Tenn. 518, 37 S. W. 387.

Where, upon the failure of a national bank, a suit is brought by a receiver under Rev. St., §§ 5157, 5152, for an assessment upon a shareholder made by the comptroller of the currency to meet the debts of the bank, and it appears that, before the suspension of the bank, such shareholder had made a bona fide sale of his stock and surrendered his certificates, and delivered to its president a power of attorney sufficient to effect, and intended to effect, as that officer knew,

a transfer of the stock on the books of the bank to the purchaser, the receiver can not recover. *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

Delivery to cashier for transfer.—Where a shareholder of a national bank makes a bona fide sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency, under Rev. St., § 5151, to pay the bank's debts. *Hayes v. Shoemaker*, 39 Fed. 319.

Cashier of bank transferee.—The owner of shares of stock in a national bank placed them in the hands of auctioneers for sale, delivering to them his certificate, with an assignment and power of attorney to transfer in blank, indorsed thereon and duly executed. The bank was in good repute, and believed by the stockholder to be solvent. The stock was sold at auction, and purchased at its par value by the cashier of the bank, to whom the certificate was delivered at the bank by the auctioneers, with a request that it be transferred. The certificate provided, in accordance with the by-laws, that the stock was only transferable on the books of the bank, and the cashier was one of the officers authorized to make transfers. The by-laws further provided that no officer, except the president and vice-president, should become stockholders without the consent of the board of directors. No consent to the purchase of this stock by the cashier was shown by the records of the bank, nor was it ever transferred to him on the books, but during nearly four years, and until the failure of the bank, semiannual dividends on the stock were paid to the cashier. The seller had no actual

law. That presents no federal question. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which required him to register his ownership for their protection.¹⁹

§ 249 (2) Liability of Both Transferor and Transferee.—The owner by assignment of stock in a national bank at the time of its failure is liable for assessments thereon, though his assignor, who transferred it knowing that the bank was in a failing condition, is also liable.²⁰

Shares Standing in Name of Agent.—The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency, and the receiver may bring an action at law for the collection of such assessment directly against him, without regard to the liability of the agent.²¹

knowledge by whom the stock had been purchased, or that it had not been transferred. Held that, under the circumstances shown, he was not bound to see that the transfer was actually made, and could not be held liable for an assessment made by the comptroller on the stock after the bank became insolvent. *Earle v. Coyle*, 95 Fed. 99, judgment affirmed in 38 C. C. A. 226, 97 Fed. 410.

S. subscribed for stock in a national bank, borrowing the money to pay for his shares from C., the cashier, to whom he indorsed and delivered the certificate as collateral. Shortly after, he sold the stock to C., who retained the certificate, but did not have the stock transferred on the books. C. collected the dividends for some years. The bank having become insolvent, and S. being sued for an assessment, held, that it might be inferred, as a fact, that the bank had notice of the transfer, from which a legal presumption would follow that it would do what it was called on to do, and that the jury should be permitted to draw such inference. *Snyder v. Foster*, 19 C. C. A. 406, 73 Fed. 136.

19. Recourse on vendee.—*Lessassier v. Kennedy*, 123 U. S. 521, 31 L. Ed. 262, 8 S. Ct. 244.

20. Liability of both transferor and transferee.—*Baker v. Reeves*, 85 Fed. 837.

Transfer by parent to children.—One C. was the holder of stock in the D. National Bank, and was also an

officer of the L. Bank, which held stock in the D. Bank. In the latter capacity, he was informed of an urgent demand upon the L. Bank to send \$5,000 by telegraph in aid of the D. Bank. Within a week after this demand, L. transferred his stock in the D. Bank, without consideration, to his five children, one of whom was a married woman and two were minors. Within five months thereafter, the D. Bank failed, and an assessment was made on the stockholders. Held, that the transfer must have been made by L., in contemplation of the liability, and that both he and his transferees were liable for the assessment, the latter because the liability was cast upon them by law when they became stockholders. *Foster v. Lincoln*, 74 Fed. 382, affirmed in 24 C. C. A. 470, 79 Fed. 170.

21. Shares standing in name of agent.—*Houghton v. Hubbell*, 33 C. C. A. 574, 91 Fed. 453.

Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. Held, that the receiver could recover from defendant an assessment on said stock, though he might have proceeded against those in whose names the shares appeared on the bank's stock register. *Hubbell v. Houghton*, 86 Fed. 547.

§ 249 (3) Liability of Transferee.—Liability of pledgee, see ante, "Liability of Pledgees," § 248 (4).

Validity and Requisites of Transferee—Purchase Induced by Fraud.—One who is induced by fraud to purchase stock of an insolvent national bank, and have it transferred to him on the books of the bank, and who, upon discovery of the fraud, takes prompt action to rescind the contract, is not liable to assessment on such stock, except on behalf of persons who extended credit to the bank, after the transfer, without knowledge of the fraud.²²

Transferrer Having No Stock at Time of Alleged Transfer.—Where, on an issue as to whether defendant was liable as a stockholder of an insolvent national bank, it appears from an agreed statement as to what the bank books and reports show that, at the time the four shares in question purported to have been transferred to him by the president, the latter's stock was all pledged, it must be held that defendant acquired no stock, and never in reality became a legal shareholder, and hence is not subject to a shareholder's liabilities.²³

Record on Books of Bank.—A person who has accepted a transfer of shares of bank stock, and to whom a certificate has been issued by the banking association, is subject to the liability imposed upon shareholders by Rev. St. U. S. 1874, tit. 62, c. 1, § 5151, although the transfer has never been recorded on the books of the association, as required by § 5139.²⁴

No New Certificate Issued.—A transferee can not escape liability from the fact that no new certificates were issued to him, as the transfer on the books was sufficient as between him and the bank; nor can he escape from the fact that when the bank was converted from a savings bank into a national bank no new certificates were issued, as the statute authorizing the conversion expressly declares that the shares of the old bank may continue to be for the same amount each as they were before the conversion.²⁵

Knowledge or Consent of Transferee.—A transferee of stock in a national bank may repudiate a transfer to him without his knowledge or consent,²⁶ but if he acquiesce therein he will be liable as a shareholder.²⁷

22. Purchase induced by fraud.—*Stuflebeam v. De Lashmutt*, 83 Fed. 449.

Though a person may have been induced by fraudulent representations to purchase stock of a national bank, the contract is voidable only at his option; and, where he has not discovered the fraud nor made his election at the time the bank passes into the hands of a receiver, he is apparently a stockholder, and can only escape liability as such by affirmatively alleging and proving the fraud, acts of diligence which negative any charge of negligence, and that no debt was created nor credit given the bank after he became such stockholder. *Wallace v. Hood*, 89 Fed. 11; *Hood v. Wallace*, 38 C. C.

A. 692, 97 Fed. 983. Judgment affirmed in 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

23. Transferrer having no stock at time of alleged transfer.—*Burt v. Richmond*, 107 Fed. 387.

24. Record on books of bank.—*Laing v. Burley*, 101 Ill. 591.

25. No new certificate issued.—*Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

26. Knowledge or consent of transferee.—*Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Married women.—See ante, "Liability of Married Women," § 248 (5).

27. Though the original transfer of bank stock was without the trans-

No general rule can be laid down as to what will constitute, in any particular case, an acceptance of the transfer of stock or the equivalent thereof, in a case where the transferee is in fact ignorant of the fact of transfer; but each case must be decided on its own facts.²⁸ A transferee of stock in a national bank is presumed to be the owner and the burden of proof is upon him to show that he is in fact not the owner.²⁹

freee's knowledge or consent, acquiescence therein by subsequently joining in an application to have the bank converted into a national bank, and receiving dividends on the stock, makes the transferee liable as a stockholder. *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

28. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

One who was notified that shares in a national bank had been transferred into his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, can not avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency. *Judgment*, 83 C. C. A. 567, 155 Fed. 107, affirmed. *Kenyon v. Fowler*, 215 U. S. 593, 54 L. Ed. 341, 30 S. Ct. 409.

Transfer to directors.—A. was sued to enforce his alleged liability upon certain shares of stock of an insolvent national bank standing in his name. The certificate for the stock had been transferred to him, without his knowledge, just before his election as a director of the bank. He accepted the directorship and acted as such up to the insolvency and failure, being subsequently made vice president and appointed acting cashier. He owned no other stock than this up to a time subsequent to his election, when he bought certain other shares, on which his liability is admitted. He never received a certificate for the former shares, but the certificate remained in the stock book in his name, and other papers of the bank showed his apparent ownership. Shortly before the failure, while the bank was insolvent, a dividend was fraudulently declared and the amount thereof according to A.'s apparent holdings was transferred to his credit. He then repudiated his ownership of the other shares and gave the president his check for the amount of the dividend thereon, instructing that they be retransferred at once. Nothing further was done until the failure. It was held that, in view of the provisions of §§ 5146, 5147 and 5210, Rev. Stat., it

must be presumed conclusively that A. knew from the time of his appointment as cashier that the books showed that he was a shareholder to the full amount charged, and he was liable to assessment thereon. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

In the present case, the defendant testifies that on the 2d of January, 1884, when he was informed of the 25 per cent dividend and of the transfer to his credit of \$1,250 thereof, he at once repudiated the transaction and ordered the Pres. to transfer the fifty shares to his own name without delay. But this was of no more effect than his drawing his check for the \$1,250 to the order of the president individually, and handing it to him. The defendant, as vice president and acting cashier of the bank, had the power himself to re-transfer the shares back to their former owners. He did not do so, but knowing that the fifty shares had been transferred to his credit and stood in his name upon the books, he suffered the matter to remain in that shape for twenty days, until the doors of the bank were closed. He states that he did not go upon the jury until after the transaction which resulted in the drawing of the check to the order of the president for \$1,250. It was the defendant's duty, and he had the power himself to make the transfer upon the books of the bank. *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788, and it made no difference as to his power to transfer, that the certificate for the fifty shares had not been delivered to him. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984. It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

29. Where shares of national bank stock were transferred to one originally without his knowledge and consent, he had a right to repudiate the trans-

Transfer after Insolvency.—A transfer of stock after the insolvency of the bank is good, and imposes upon the transferee the liability of a stockholder,³⁰ though, by the bank's charter, the assignor of the stock is still liable thereon.³¹

Purchase by Parent in Name of Minor Children.—See ante, "Persons Deemed to Be Shareholders for Purpose of Assessment," § 248 (1b).

Shares Transferred to Wife by Husband.—See ante, "Liability of Married Women," § 248 (5).

§ 250. — **Actions and Proceedings to Enforce**—§ 250 (1) **Nature and Form**—§ 250 (1a) **Voluntary Liquidation.**—In the original National Banking Act there was no provision for enforcing the individual liability of stockholders in case of voluntary liquidation;³² such omission did not leave the creditors without remedy,³³ but the proceedings must have been in equity.³⁴

Statutory Remedy.—Congress, by Act of June 30, 1876, supplied the omission in the original banking act and provided for a proceeding by any creditor in the nature of a creditor's bill to enforce the statutory double

action; but he is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner and the burden of proof is upon him to show that he is in fact not the owner. *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290. Here it is entirely clear, on the evidence, that the defendant did not sustain such burden of proof; and that there was no question thereon for the jury. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

30. Transfer after insolvency.—*Robinson v. Beall*, 26 Ga. 17.

31. Robison v. Beall, 26 Ga. 17.

32. Voluntary liquidation.—By the original National Banking Act, § 5151, Rev. Stat., the individual liability was provided for, and "by § 5220, it was also provided that 'Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.' But no provision is contained in the original act specifying what course may or shall be taken, in case of voluntary liquidation, to enforce the individual liability of the shareholders." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

33. "It can hardly be supposed that the omission in the statute to provide an express and specific course of proceeding, by way of judicial remedy, in

case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against either a deficiency of assets or the results of a fraudulent maladministration. Section 5151 imposes upon the shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

34. Remedy in equity.—As all the shareholders are bound in that way to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity. Besides, this, it must be admitted that a court of equity would be entitled, upon the general principles of its jurisdiction, to entertain a bill by one or more creditors whose suit would necessarily be for the benefit of all, against the association and its officers and managers, and all those participating in its voluntary liquidation, for the purpose of preventing and redressing any maladministration or fraud against creditors, contemplated or executed. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

liability of stockholders in insolvent national banks which go into voluntary liquidation,³⁵ similar to that in cases of involuntary liquidation.³⁶

35. Statutory remedy.—*Richmond v. Irons*, 121 U. S. 27, 48, 30 L. Ed. 864, 7 S. Ct. 788.

"The omission in the original banking Act of 1864 to provide expressly similar remedies in case of voluntary liquidation to those specified in case of involuntary liquidation was supplied by the Act of June 30, 1876, 19 Stat. 63; Supplement to Rev. Stat., 216. The first section of that act provides for the appointment of a receiver by the comptroller of the currency, as provided in § 5234, Rev. Stat., whenever any national bank shall be dissolved and its charter forfeited as prescribed in § 5239, Rev. Stat., or whenever any creditor shall have obtained a judgment against it which has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of its insolvency after due examination. This receiver, it is declared, shall proceed to close up such association and enforce the personal liability of the shareholders, Section 2 of the Act of June 30, 1876, is as follows: 'That when any national banking association shall have gone into liquidation, under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders, provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.' This section was in force when the first amended bill was filed in October, 1876. Whether we regard it as merely declaratory of the law as it stood under the original banking act, or as giving a new remedy which could not have been resorted to before, we think it warranted the court below in permitting the complainant to file his first amended bill." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788. See *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

If such a bill would have been objectionable without the Act of June 30, 1876, 19 Stat. 63, it is warranted by the

statute. It is no objection that the original bill was filed prior to the passage of the Act of June 30, 1876. The bill as amended, being authorized by the statute in force at the time the amendment was filed, would justify such a proceeding in a pending suit to which it was made germane by the statute itself, as well as an original bill then for the first time filed. Neither is the objection valid that it does not purport to have been filed in pursuance of the Act of June 30, 1876, and is not filed by the complainant on behalf of all the creditors. The scope and prayer of the bill under the operation of the statute made it a bill for the benefit of all the creditors, notwithstanding it erroneously claimed priority on behalf of the complainant individually. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

36. Remedy similar to that in involuntary liquidation.—In the case of involuntary liquidation under the supervision of the comptroller of the currency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, so far as may be necessary, to enforce the individual liability of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least, so closely connected with it as to constitute but one continuous transaction. When, in the case of voluntary liquidation, the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceeding should be considered as changed. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series or transactions which constitute the liquidation of the affairs of the bank. It was, therefore, proper to describe the bill to be filed by and on behalf of creditors as in the nature of a creditors' bill so as to enlarge the scope and purpose of a bill that might be more strictly limited as a creditors' bill merely. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

"In the liquidation of such an asso-

As Creditor's Suit.—Where a national bank goes into voluntary liquidation, the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by the Act of June 30, 1876, c. 156, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], by a suit in equity in the nature of a creditors' suit brought on behalf of all creditors in a court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the court of original jurisdiction, and brought by a receiver or other person appointed by such court.³⁷

The purpose of the statute is to create a fund to be applied with and in aid of the assets of the bank in all cases of voluntary, as of involuntary liquidation, through a general creditor's suit in a court of equity, having power to enforce the liability equally and ratably as between the shareholders and to determine the extent to which and for whose benefit it shall be enforced.³⁸

Remedy Cumulative.—The remedy of a creditors' suit to enforce the liability of shareholders of national banks in voluntary liquidation, provided by Act June 30, 1876, § 2, 19 Stat. 63, c. 156 [U. S. Comp. St. 1901, p. 3509], is cumulative, and not exclusive.³⁹

Judgment at Law Not a Prerequisite.—Recovery of judgment at law is not a prerequisite.⁴⁰

ciation, those entrusted with its management occupy the relation of trustees first for creditors, and the terms of that trust, implied by law, require them to reduce the assets of the association to money or its equivalent, and to pay out those assets or their proceeds equally among creditors." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

37. Nature of suit.—Decree 109 Fed. 36, affirmed in *Williamson v. American Bank*, 52 C. C. A. 1, 115 Fed. 793.

"The suit, although in the nature of a creditors' bill, is not a bill merely for the administration of the assets of an insolvent corporation. There is no fund formerly belonging to the corporation in court for distribution. It is a suit for the enforcement of a personal liability of the defendant stockholders to pay the debts of the corporation, in which the creditors are the complainants. Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid

claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a cocomplainant." *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

38. Purpose of statute.—*Williamson v. American Bank*, 109 Fed. 36, affirmed 52 C. C. A. 1, 115 Fed. 793.

39. Remedy cumulative.—*King v. Pomeroy*, 58 C. C. A. 209, 121 Fed. 287.

40. Recovery of judgment not a prerequisite.—*Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

All of the assets of an insolvent national bank in process of voluntary liquidation having been placed in the hands of a defendant, who, by express

Stockholder Voting against Liquidation Bound.—The result is the same, where the requisite amount of stock voted in favor of what was done in the way of voluntary liquidation, whether the particular stockholder proceeded against voted for or against same. He is bound by such action.⁴¹

§ 250 (1b) Involuntary Liquidation—§ 250 (1ba) Receiver-ship—§ 250 (1baa) Necessity for and Powers Generally.—The receiver of an insolvent national bank obtains his appointment from the comptroller of the currency, and acts under his directions and orders, which are analogous to an order of court to a receiver appointed by it.⁴² In the case of involuntary liquidation under § 5234, the business of liquidation, as defined and required by the law, involves the appointment of a receiver, who shall, in addition to the collection of the ordinary assets of the bank, also enforce against the stockholders their individual liability, so far as necessary to create a fund sufficient to pay all the debts of the association.⁴³

§ 250 (1bab) Right of Receiver to Sue.—Rev. St., § 721, makes state laws applicable as rules of decision in trials at common law, in the federal courts, only where it is not otherwise provided by federal enactment, and the right of a receiver of a national bank to bring a suit in his own name to recover an assessment laid on stockholders for the purpose of paying debts grows out of Rev. St., § 5234, and the state rules do not apply.⁴⁴

Effect of Authority to Compromise or Sell Assets.—Specific authority given by the comptroller to the receiver of a national bank to bring an

contract, was constituted a trustee for the primary benefit of another national bank, which became a creditor of the liquidating bank by the assumption and payment of the demands of all of the other creditors of the liquidating bank, complainant, the holder of the note executed by the liquidating bank as a part of the assumption contract, sued to enforce an asserted lien by way of pledge on all of the undisposed assets of the liquidating bank, to obtain a judicial administration of its affairs, and to enforce the statutory obligation of stockholders. Held, that it was no objection to complainant's capacity to sue that his claim had not been reduced to judgment. *George v. Wallace*, 135 Fed. 286, 68 C. C. A. 40, affirmed *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495, and *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

41. Dissenting stockholder bound.—*Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

42. Necessity for receiver and

powers.—*King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

43. "It is provided by § 5234 that when the comptroller of the currency has become satisfied of the default of the association under §§ 5226, 5227 to redeem any of its circulating notes, he may forthwith appoint a receiver, who, under his direction, shall take possession of the books, records, and assets of the association, collect all debts, dues, and claims belonging to it, 'and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.'" *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788. See, also, *Turner v. Richardson*, 180 U. S. 87, 45 L. Ed. 438, 21 S. Ct. 295.

44. Right of receiver to sue.—*Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357. See post, "Persons Who May Sue and Parties Plaintiff," § 250 (4aa).

action against a stockholder to recover an assessment is not withdrawn or affected by a subsequent general authority to compromise or sell all the claims or assets of the bank.⁴⁵

§ 250 (1bac) Sale or Assignment by Receiver.—When the comptroller of the currency decides that it is necessary to enforce the personal liability of a stockholder in an insolvent national bank, and fixes and adjusts the amount thereof, it becomes a definite, liquidated claim against such stockholder, and is subject to sale or assignment by the receiver like any other claim which he may hold as a part of the bank's assets.⁴⁶ Rev. St. U. S., § 5234, providing that the receiver of a national bank "may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders," does not impose any such particular personal trust upon the receiver in the matter of collecting the liability as would deprive him of the power to make a valid assignment thereof after it has been fixed and adjusted by the comptroller of the currency.⁴⁷

§ 250 (1bad) Compromising or Compounding Statutory Liability of Stockholder.—Rev. St., § 5234, authorizing the receiver of a national bank to compromise "bad or doubtful debts" under order of court, does not include the individual liability of the stockholders.⁴⁸

§ 250 (1bb) Action at Law or Suit in Equity.—A receiver of a national bank is not compelled to proceed by bill in equity against all the stockholders, to collect an assessment which the comptroller of the currency has directed to be levied upon them, but may proceed by separate actions at law, against the separate stockholders, to recover the amount due from each,⁴⁹ for the reason that the liability of the stockholders is several.⁵⁰ Where the comptroller of the currency orders an assessment upon the stockholders of an insolvent national bank equal to the par amount

45. **Effect of authority to compromise or sell assets.**—*McClaine v. Rankin*, 56 C. C. A. 160, 119 Fed. 110, reversed 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

46. **Sale or assignment by receiver.**—*Waldron v. Alling*, 73 App. Div. 86, 76 N. Y. S. 250.

47. *Waldron v. Alling*, 73 App. Div. 86, 76 N. Y. S. 250.

48. **Compromising or compounding statutory liability of stockholders.**—*Price v. Yates*, Fed. Cas. No. 11,418.

A federal court will not authorize the receiver of a national bank to compound the statutory liability of certain stockholders by accepting a gross sum, less than is due, in satisfaction thereof, although more money would thus be realized than by proceedings to collect the same in the usual way, when it appears probable that such stockholders have fraudulently con-

veyed their property to avoid their legal obligations as stockholders, or to shield themselves from injury and exposure by litigation. In *re Certain Stockholders*, 53 Fed. 38.

49. **Action at law or suit in equity.**—*Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357.

An assessment by the comptroller of the currency against the stockholders of a national bank may be collected by the receiver by an action at law against the stockholders. *Young v. Wempe*, 46 Fed. 354.

50. **Liability several.**—Since the liability of stockholders in national banks is several, when the comptroller had ordered an assessment an action at law may be brought by the receiver against a stockholder to recover the sum due. *Bailey v. Sawyer*, Fed. Cas. No. 744, 4 Dill. 463.

of the stock, the suit must be at law;⁵¹ but where only a portion of the full liability is to be enforced, the jurisdiction at law and in equity is concurrent.⁵²

Power of Trustee to Purchase in Question.—Where the question of the liability of a trust estate for an assessment on shares of an insolvent national bank held by the trustee depends upon the power of the trustee, under the terms of the trust, to purchase such shares for the estate, such question can not be determined in an action at law by the bank receiver

51. Action for entire amount must be at law.—*Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Hale v. Allison*, 188 U. S. 56, 47 L. Ed. 380, 23 S. Ct. 244. See *Keyser v. Hitz*, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

52. Jurisdiction to collect part of liability concurrent.—*Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801, affirming 86 Fed. 46.

"The comptroller, in the exercise of his discretion, may levy successive assessments as they may appear to be necessary. If the power can be exercised only once, no reason is apparent why equity should have jurisdiction for the collection of an assessment less than one hundred per cent. If the stockholders' liability is fixed once for all by the first assessment of the comptroller, the legal remedy for the collection of a ten per cent assessment is as full, adequate and complete as it is for the collection of the one hundred per cent assessment. The reason why, when the assessment is for the one hundred per cent the proceedings must be at law, and when for a less amount it may be in equity, is obvious. When the full amount is assessed there can be but one suit against each stockholder. He is suable for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment is made, there may be other assessments, when the receiver has liberty to sue at law for even a partial assessment, though equity has concurrent jurisdiction to pre-

vent a multiplicity of suits." *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845.

Interlocutory decree.—And in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

When action of debt lies.—A court of equity is the proper tribunal to ascertain the proportion of indebtedness chargeable to a stockholder of a bank on his personal liability. But where, by the law of the state, as declared by its highest tribunal, an action of debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation, a similar action at law will be sustained in such cases in the circuit court of the United States. *Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294.

"Such liability may undoubtedly be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one, as was held by this court in *Pollard v. Bailey* (U. S.), 20 Wall. 520, 22 L. Ed. 376." *Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294. See, also, *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537.

A bill for discovery as well as relief will lie, the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, and it is clear that equity has jurisdiction to set it aside and enforce the liability of the transferor. *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

against the stockholder, though it is alleged that he holds the stock as trustee.⁵³

Against Married Woman.—Proceeding against a married woman to subject her separate property to her liability, as a stockholder in a national bank, it not appearing she could be sued at law, must be in equity.⁵⁴ The liability of the married woman to respond to an assessment on her stock being personal, and the amount sought to be recovered a sum certain, the remedy to enforce the assessment against the married woman, and to charge her separate property, is at law, and not in equity.⁵⁵ The bill alleging that the married woman is possessed of property in her own right sufficient to pay the assessment, and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee, or executor, the case is one of equitable cognizance.⁵⁶

§ 250 (1bc) Courts and Venue.—Courts of United States.—The proceedings to enforce the individual liability of shareholders in a national bank may be in the courts of the United States without reference to the personal citizenship of the receivership.⁵⁷

Voluntary Liquidation.—A suit for the purpose of enforcing the individual liability of shareholders of a national bank which has gone into voluntary liquidation can not be maintained in any district other than that in which the bank is located.⁵⁸

§ 250 (1bd) Set-Off by Receiver in Suit on Stockholder's Deposit Claim.—A receiver winding up a national bank may set off the additional liability of a stockholder against a dividend due on the deposit account of the stockholder; and it is immaterial that the claim to the divi-

53. Power of trustee to purchase in question.—*Hampton v. Foster*, 127 Fed. 468.

54. Against married woman.—Where the bill alleges that the married woman owner is possessed of property in her own right amply sufficient to pay the assessment, and the prayer of the bill is for a decree for the payment of the amount of the assessment out of the separate property held by her in her own right, and the bill of revivor prays for relief against her husband out of the assets received by him as the legatee or devisee of his wife, or as executor of her will, the case is clearly one of equitable cognizance, because it does not appear that she could be sued at law, to reach her separate property. 3 Pomeroy's Eq. Jur., § 1099. *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 396, 9 S. Ct. 242.

55. *Witters v. Sowles*, 32 Fed. 767.

56. *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 396, 9 S. Ct. 242.

57. Courts of United States.—“The 59th section (National Banking Act, 1863. See § 57, Act of 1864, 13 Stat. at Large, 99, 116), directs ‘that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury.’ Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship.” *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

58. Voluntary liquidation.—*Williamson v. American Bank*, 109 Fed. 36, affirmed in 52 C. C. A. 1, 115 Fed. 793.

dend has been assigned to others, or that the amount of the stockholder's liability has not been determined.⁵⁹ The indebtedness of the stockholders of a national bank on their individual liability, together with the other assets of the bank, constitute a trust fund for the benefit of its creditors; and, on the bank's becoming insolvent, the indebtedness of a stockholder who is also insolvent may, in equity, be set off against a dividend, payable out of the trust fund, on a balance due him on his deposit account with the bank at the time of its failure.⁶⁰

Assignment by Stockholder of His Depositor's Claim.—An assignment by the stockholder of an insolvent national bank of his deposit claim against the bank, before the direction of the comptroller to enforce his individual liability as stockholder, but after the insolvency of the bank, does not affect the right of the bank to set off such liability against the dividend due on his claim, nor does the fact that the comptroller, at the time of the assignment, had not determined the amount necessary to be collected from the stockholders for the payment of the creditors, affect such right.⁶¹

§ 250 (1be) Enjoining Assessment.—Equity would no doubt enjoin a palpably erroneous assessment by the comptroller of the currency in enforcing the statutory double liability of stockholders in an insolvent national bank;⁶² but equity will not restrain the enforcement of an assessment on the ground that the shareholders had already paid a voluntary as-

59. Set-off in suit on stockholder's deposit claim.—*Brownell v. Armstrong*, 10 O. Dec. 368, 20 Wkly. L. Bull. 465.

60. *King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

61. Assignment by stockholder of his depositor's claim.—*King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

It is sufficient that such direction has been given, and amount so determined, when the set-off is made. *King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

62. Relief against erroneous assessment.—"Although assessments made by the comptroller, under the circumstances of the first assessment, in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it can not be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216. And see *First Nat. Bank v. National Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840.

"Nothing in this opinion is intended in any wise to affect the authority of *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476, and *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307. On the contrary, we approve and reaffirm the rule laid down in those cases." *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216.

Even his decision does not determine the liability except as to contracts, debts, and engagements of the bank lawfully incurred. *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

Proceedings to enjoin the comptroller of currency under the National Bank Act must, it is true, be instituted and prosecuted in a circuit, district, or territorial court of the United States, but the act allows creditors to sue in the proper state courts in all suits, actions, and proceedings against the association, as specifically provided in the fifty-seventh section of the act. Authorities to support the proposition are not necessary, as it rests upon an express provision in the act of congress. *First Nat. Bank v. National Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840.

assessment equal to the par value of their shares to restore unpaid capital stock.⁶³

§ 250 (2) Time to Sue and Limitations.—Applicability of State Statute.—In the absence of any provision of the act of congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable,⁶⁴ and where the state statute makes no distinction between foreign and domestic corporations, none obtains.⁶⁵

Law Prescribing Time for Presentation of Claims.—Under Rev. Stat., § 5152, a claim against an estate in the hands of an executor for assessments on national bank stock is not affected by the state laws pre-

63. Payment of voluntary assessment as ground for injunction.—The Pacific National Bank of Boston was organized in October, 1877, with a capital of \$250,000, with the right to increase it to \$1,000,000. In November, 1879, its capital was raised to \$500,000; September 13, 1881, the directors voted to increase the capital to \$1,000,000. On November 18, 1881, the bank suspended. On December 13, 1881, the directors voted that as \$38,700 of the increase of capital stock had not been paid in, the capital be fixed at \$961,300, and the comptroller of currency was notified to that effect, and he notified the bank, under Rev. St., § 5205, to pay a deficiency on its capital stock by an assessment of 100 per cent. At the annual meeting the assessment was voted, and on March 18, 1882, with consent of the comptroller and the approval of the directors and the examiner, the bank resumed business, and continued until May 20, 1882, when it again suspended and was put in the hands of a receiver. Prior to May 20, 1882, \$742,800 of the voluntary assessment had been paid in. Complainant was the owner of twenty-five shares of stock on September 13, 1881, and after the vote to increase the stock, took twenty-five shares, for which he paid \$2,500, on October 1, 1881, and received a certificate. He voted for the assessment at the annual meeting, and in February, 1882, paid the assessment on the old and new stock, and subsequently sought to enjoin the suit at law against him by the receiver, to enforce his individual liability as a stockholder, under Rev. St., § 5151, on the ground that the increase of capital was illegal and void, and that the voluntary assessment under Rev. St., § 5205, re-

lieved the stockholders of individual responsibility. Held, that he was not entitled to relief, and the bill should be dismissed. *Morrison v. Price*, 23 Fed. 217, affirmed in 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

64. State statute applicable.—Rev. Stat., § 721; *Campbell v. Haverhill*, 155 U. S. 610, 39 L. Ed. 280, 15 S. Ct. 217; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

Actions by the receiver of a national bank against stockholders for assessments on the stock are subject to the state statutes of limitations. *Butler v. Poole*, 44 Fed. 586.

65. Foreign and domestic corporations.—Section 394 of the Code of Civil Procedure of New York, which excepts from the general limitation statutes an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute (but such an action must be brought within three years after the cause of action has accrued), applies to directors and stockholders of foreign corporations. *Platt v. Wilmot*, 193 U. S. 602, 48 L. Ed. 809, 24 S. Ct. 542.

"The substance of the legislation is that when suits are brought in the state of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that state in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do." *Platt v. Wilmot*, 193 U. S. 602, 48 L. Ed. 809, 24 S. Ct. 542.

scribing the time for presentation of claims.⁶⁶

Not a Liability upon Contract.—So far as the statute of limitations of a state is concerned at least, the individual liability of a shareholder in a national bank is one arising from the statute creating it and not a liability upon a contract,⁶⁷ certainly not upon a written contract.⁶⁸

When Statute Begins to Run.—Since the statutory liability of shareholders in a national bank is conditional, the statutes of limitation do not

66. Law prescribing time for presentation of claims.—*Zimmerman v. Carpenter*, 84 Fed. 747.

67. Liability statutory.—"It is true that in particular cases the liability has been held to be in its nature contractual, yet it is nevertheless conditional, and enforceable only according to the federal statute, independent of which the cause of action does not exist, so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions." *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

"In *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419, the stock still stood in the name of the decedent, and it was decided that the statutory liability was a debt within the state law, but not that it was a true contract." *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

"Some statutes imposing individual liability are merely in affirmation of the common law, while others impose an individual liability other than that at common law. If § 5151 had provided that subscribing to stock or taking shares of stock amounted to a promise directly to every creditor, then that liability would have been a liability by contract. But the words of § 5151 do not mean that the stockholder promises the creditors as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory." *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

68. Not upon written contract.—In *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, the action was brought on an assessment upon the stockholders of a national bank to the amount of the par value of the shares, and not to recover an amount

unpaid on the original subscription, and it was held that the five-year limitation did not apply, because the cause of action was not upon a written contract, but that the four-year limitation applied, "whether the promise raised by the statute was an implied contract not in writing or a liability created by statute," no distinction between them as to the limitation being made by the state statute. *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

There is no contract in writing with the creditors or depositors of the bank, and none with the bank itself, to which the receiver could be said to be a privy, except to pay for the stock as originally issued. Granting there was a contract with the creditors to pay a sum equal to the value of the stock taken, in addition to the sum invested in the shares, this was a contract created by the statute, and obligatory upon the stockholders by reason of the statute existing at the time of their subscription; but it was not a contract in writing under the statute of limitations. *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845.

Whether the promise raised by the statute was an implied contract not in writing or a liability created by statute, it is immaterial to inquire. For the purposes of this case it may have been both. The statute was the origin of both of the right and the remedy, but the contract was the origin of the personal responsibility of the defendant. Did the statute make a distinction between them with reference to the time within which an action must be brought, it might be necessary to make a more exact definition; but as the action must be brought in any case within four years, it is unnecessary to go farther than to declare that it is not a contract in writing within the meaning of § 10 of the Nebraska act. *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845.

commence to run until after the assessment has been made by the comptroller of the currency.⁶⁹

Period.—An action to recover from a shareholder of an insolvent national bank an assessment levied on the stock is an action to enforce a liability created by law, within Code Civ. Proc., § 359, providing that the title, under which it is placed "Of the time of commencing civil actions" does not affect actions against stockholders to enforce a liability created by law, but that such actions must be brought within three years after discovery of the facts on which the liability was created; and a stockholder who has been absent from the state during a part of the period of limitation may rely on the limitation, notwithstanding § 351 of the same title which excludes from the limitation period the time during which defendant may have been absent from the state.⁷⁰

Effect of Suit as Suspending Statute.—The filing of a bill filed under the United States statute of June 30, 1876, by a creditor of a national bank, against stockholders of such bank, to enforce their individual liability being for the benefit of all creditors of the bank, although it does not contain an averment of that fact, stops the running of the statute of limitations upon all claims against the bank.⁷¹

Rendition of a judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of an assessment on shareholders to pay debts, on which execution was directed to issue against the estate of the wards, did not stop the running of the statute of limitations

69. Commencement of period.—

McDonald v. Thompson, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410. But see *King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

"The right to sue did not obtain until the comptroller of the currency had acted, and his order was the basis of the suit. The statute of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability and not an action for breach of contract." Subdivision 3 of § 4800 of *Bollinger's Washington* did not apply, and § 4805 did. *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29.

Where the action is not brought by the creditors under the second section of the Act of June 30, 1876, but by the receiver under Rev. Stat., § 5234, in such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run.

McDonald v. Thompson, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, 9 S. Ct. 739; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

"Cases such as *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738, and *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 33 L. Ed. 231, 10 S. Ct. 19, are not controlling, for in them the right to recover was direct and immediate and not secondary and contingent. * * * In *Carrol v. Green* it was said: 'According to the statute, the liability of "each stockholder" arose upon "the failure of the bank." The liability gave at once the right to sue; and, by necessary consequence, the period of limitation began at the same time.' " *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

70. Period.—*King v. Armstrong* (Cal.), 99 Pac. 527.

71. Effect of suit as suspending statute.—*Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591.

in favor of the wards, even if they were personally liable.⁷²

Relief against Bar in Equity.—Equity will not relieve against the bar of the statute of limitations, where on a bill by the receiver of an insolvent national bank to collect an assessment by the comptroller from a former stockholder, on the ground that, to escape liability, he had transferred his shares, within six months of the bank's failure, to one having no means, it appeared that the transfer was made on the books of the bank, no concealment thereof being attempted, and that the receiver made no inquiry as to the nature of the transfer, and took no action against defendant until the assessment had become barred.⁷³

§ 250 (3) Conditions Precedent and Defenses—§ 250 (3a) Action of Comptroller—§ 250 (3aa) Involuntary Liquidation of Bank.—Where a national bank has become insolvent, the personal liability of a stockholder cannot be enforced by the receiver until an assessment has been made by the comptroller of the currency.⁷⁴ It is for the comptroller to decide when to proceed against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive.⁷⁵ This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver.⁷⁶

Time of Decision.—Since no action by the receiver of a national bank to enforce a stockholder's liability can be brought until the comptroller of the currency has decided the necessity therefor to meet the debts of the bank, and has instructed the receiver, such decision of the comptroller must be made within a reasonable time after the appointment of the receiver, so that the action will not be barred, such time being the statutory limitation

72. Judgment in favor of receiver.—*Clark v. Ogilvie*, 111 Ky. 181, 23 Ky. L. Rep. 552, 63 S. W. 429.

73. Relief against bar in equity.—*Thompson v. German Ins. Co.*, 77 Fed. 258.

74. Involuntary liquidation of bank.—*Davis v. Weed*, Fed. Cas. No. 3,658, 44 Conn. 569; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

A right of action by the receiver of an insolvent national bank against a stockholder to recover an assessment does not arise until the necessity for the assessment has been determined and the assessment made by the comptroller, if it in fact accrues before demand and refusal to pay. *Aldrich v. Yates*, 95 Fed. 78.

75. Question for decision of comptroller.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29. See ante, "Conclusiveness of Decision," § 248 (2cb).

76. Action of comptroller must precede suit.—*McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Averment and proof of assessment by comptroller or grant of time to sue.—See post, "Parties and Pleading," § 250 (4).

of actions on contract prescribed by the state where the federal court in which the action is brought is held.⁷⁷

§ 250 (3ab) Voluntary Liquidation of Bank.—Where a court has appointed a receiver to liquidate the debts of a national bank in voluntary liquidation, no action of the comptroller is required to empower such receiver to enforce the liability of the shareholders.⁷⁸ The right of a receiver of a national bank in liquidation to enforce the liability of shareholders does not accrue until such liability matures by the act of the court in determining the amount to be paid.⁷⁹

§ 250 (3b) Defenses and Facts Relieving from Liability—§ 250 (3ba) Nonexistence or Invalidity of Corporation.—In such a suit, the stockholder is estopped from denying the existence or the validity of the corporation.⁸⁰

§ 250 (3bb) Fraud, Irregularity or Illegality in Organization, Management or Issue of Stock.—It is incompatible with the policy and purposes of the national banking laws to permit mere irregularities, or even fraudulent practices, in the organization or management of a bank created thereunder, to invalidate its action, and give ground for a stockholder to repudiate his obligations to the public.⁸¹

Invalidity of Stock.—Subscribers to a duly-authorized increased issue of stock by a national bank, who accept certificates therefor, vote the stock by proxy, and take dividends thereon, cannot question the validity of such stock, as against the receiver, after the bank has become insolvent.⁸²

Original Capital Stock Never Paid.—A stockholder, by purchase in a national bank which has conducted business as such for six years, cannot defend against an assessment, on its insolvency, on the ground that the original capital stock was never paid in.⁸³

Subscription Induced by Fraud.—Where a subscriber for stock in a national bank became a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of § 5151, if at the time the rights of creditors accrued he

77. Time of decision.—Price *v.* Yates, Fed. Cas. No. 11,418.

78. Voluntary liquidation of bank.—King *v.* Pomeroy, 58 C. C. A. 209, 121 Fed. 287.

79. King *v.* Pomeroy, 58 C. C. A. 209, 121 Fed. 287.

80. Estoppel of stockholder to deny existence of corporation.—Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168, 307.

81. Fraud, irregularity or illegality in organization or management and

issue of stock.—Tillinghast *v.* Bailey, 86 Fed. 46, affirmed in Bailey *v.* Tillinghast, 40 C. C. A. 93, 99 Fed. 801.

82. Invalidity of stock.—Tillinghast *v.* Bailey, 86 Fed. 46, affirmed in Bailey *v.* Tillinghast, 40 C. C. A. 93, 99 Fed. 801.

83. Original capital stock never paid.—Wallace *v.* Hood, 89 Fed. 11; Hood *v.* Wallace, 38 C. C. A. 692, 97 Fed. 983. Judgment affirmed 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

occupied and was accorded the rights appertaining to that position.⁸⁴ He is not entitled to a rescission unless he affirmatively shows that there are no creditors who became such while he was a registered stockholder.⁸⁵ Fraudulent representations by which a person is induced to become a stockholder of a national bank constitute no defense in an action at law by a receiver of the bank to enforce the statutory liability of the stockholders,

84. Fraud practiced to obtain subscription.—*Scott v. Deweese*, 181 U. S. 202, 213, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

"Assuming that the defendant became a shareholder in consequence of the fraudulent representations of the bank's officers, as set forth in the answer and cross petition or counterclaim, two principal questions are presented for determination: Whether such representations, relied upon by the defendant, constituted a defense in the present action brought by the receiver only for the purpose of enforcing the individual liability imposed by § 5151 of the Revised Statutes upon the shareholders of national banking associations." Held, that they did not. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

Quære, whether the defendant could have been discharged from liability as a shareholder if the facts stated in his answer by way of defense had been established in a separate suit in equity. Whether a decree based upon the facts set forth in the answer, even if established in a suit in equity brought against the bank and the receiver after the appointment of a receiver, would be consistent with sound principle or with the statute regulating the affairs of national banks and securing the rights of creditors, is a question not decided here. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

85. Effect of creditor becoming such while plaintiff registered stockholder.—One who becomes and remains a stockholder of a national bank for a considerable length of time while the bank is engaged in business, and until it is declared insolvent, can not avoid such liability on the ground that this subscription was induced by fraud

which would entitle him to a rescission as between himself and the corporation, unless it is affirmatively shown that there are no creditors who became such while he was a registered stockholder. *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

In exceptional cases, where there is no ground for an inference that credit was extended to a national bank on the faith of the ownership of stock by defendant, he should be permitted to rescind his agreement of purchase after insolvency of the bank, where it was induced by fraud, as well when there are creditors as when there are none. There should be no presumption of law to overcome the fact capable of proof in such a case. *Stufflebeam v. De Lashmutter*, 101 Fed. 367.

Defendant, sued by the receiver of an insolvent national bank for an assessment as a stockholder, was induced to purchase the stock held by him at the time the bank was closed from the president of the bank by the fraudulent representations of the president and cashier. Such fraud had been established in a suit for rescission of the contract, brought by defendant in a state court, to which the receiver was a party. The bank was in fact insolvent when the purchase was made, and was closed by the comptroller within thirty-six days thereafter. The defendant lived several hundred miles from the place where the bank was located, and took no part in its affairs. Held, that an answer setting up such facts as a defense was not demurrable. *Stufflebeam v. De Lashmutter*, 101 Fed. 367.

Conclusiveness of decree.—While, in such case, the decree of the state court rescinding the contract could not be pleaded as a bar, the question of defendant's liability as a stockholder to creditors of a bank not having been in issue, such decree was conclusive as between the receiver and the defendant as to the question of fraud in defendant's purchase, and for that purpose might properly be pleaded by defendant. *Stufflebeam v. De Lashmutter*, 101 Fed. 367.

as the defense is of an equitable nature, and must be asserted, if at all, in equity.⁸⁶

Subscriber to Proposed Increase Which Failed.—Where a national bank received subscriptions to increase its capital stock, but before completing the proceeding, and before obtaining the approval of the comptroller, it became insolvent, and a receiver was appointed, who brought action to enforce the subscriptions, the receiver can assert no rights against the subscribers which the bank could not have asserted, and therefore, as no valid stock can issue to the subscribers, there can be no recovery.⁸⁷

Subscription Part of Increased Issue.—The fact that the shares belonging to a stockholder are part of an increased issue will not relieve the holder from liability to assessment upon the insolvency of the bank, although the proposed increase was reduced,⁸⁸ or where the increase was illegal because of a noncompliance with conditions upon which an increase of capital stock may be made; as, for instance, where the whole increase was not paid in as certified by the comptroller of the currency.⁸⁹

86. Fraud as defense to action at law.—Judgment 38 C. C. A. 510, 97 Fed. 865, affirmed. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

87. Subscriber to proposed increase which failed.—*Winters v. Armstrong*, 37 Fed. 508.

88. Proposed increase reduced.—By a resolution duly passed, the stockholders of a national bank authorized an increase of \$300,000 in the capital stock, and under such resolution defendants and others subscribed and paid for such stock to the amount of \$150,000, and received certificates therefor, upon which dividends were paid the same as on the original stock. The names of the subscribers were entered on the books of the bank as stockholders, but the increase was not certified to the comptroller until three years later, the stock being shown during that time in the published statements of the bank as "stock paid in, but not certified." At the end of that time a second resolution was passed, reducing the amount of the authorized increase to \$150,000, and directing the same to be certified to the comptroller, which was done, and the increase was approved by him. The bank was then known to be insolvent, and was immediately thereafter closed, and a receiver appointed. Held, that the action of the stockholders in reducing the amount of the increase was legal, and that of the comptroller in approving the increase under the circumstances was proper; that the subscribers became stockholders, and had no equitable ground upon which to repudiate

their liability as such to the creditors of the bank. Decree, *Tillinghast v. Bailey*, 86 Fed. 46, affirmed. *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801.

89. Increase not paid in as certified by comptroller.—A holder of certificates of stock in a national banking association can not escape liability as a stockholder to creditors, under Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3465], on the ground that the shares of stock which he holds are part of an increase which was made without compliance with the conditions of Act May 1, 1886, c. 73, 24 Stat. 18 [U. S. Comp. St. 1901, p. 3456], which prohibits the increase of capital until the whole amount of such increase is paid in and the comptroller has certified to that fact, even if he has been induced to take such shares by fraud of the officers of the bank and of the comptroller. Judgment *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843, affirmed. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

"Under § 5142, as modified by the act of May 1, 1886, each subscription for portions of increased capital 'when paid up in full becomes valid and binding until the maximum is reached, and the statute does not incorporate into such subscriptions, a condition that the subscriber paying such subscription in full can not become a holder of valid stock unless the maximum amount of the proposed increase is subscribed and paid for.' * * * It follows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to

Subscriber to Increased Issue Receiving Original Stock.—One who subscribes and pays for a specified number of shares of a “proposed increase” of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a “shareholder” within the meaning of Rev. Stat., § 5151, imposing individual liability on the shareholders for the debts of national banks,⁹⁰ unless he acquiesces in or assents to such change.⁹¹

enjoy, the privileges of a shareholder, as against the bank, is a shareholder upon whom assessments may be made in conformity with § 5151.” *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

By force of the words in § 5142, that “no increase of capital shall be valid until the whole amount of such increase is paid in,” and until the comptroller shall certify that the amount of the proposed increase” has been duly paid in as part of the capital of such association,” it does not follow that one who claimed to be a shareholder in respect of an increase of the bank’s capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under § 5151, by simply proving—after the bank has suspended and has been placed into the hands of a receiver—that the whole amount of the proposed increase was not in fact “paid in” as required by § 5142, although the contrary was certified by the comptroller upon the bank’s report to that officer. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

As between the bank and the defendant, the latter, having paid the amount of his subscription for shares in the proposed increase of capital, was entitled to all the rights of a shareholder, and therefore, as between himself and creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him, although the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the comptroller and proceeded to do business upon the basis of such increase before the whole proposed increase was paid in. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw*

v. National German-American Bank, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

“Immediately upon the failure of the bank the rights of creditors attached under § 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so.” *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

If this prohibition be disregarded by a national bank, the conduct of its business could no doubt be controlled by the representatives of the government so far as might be necessary to compel obedience to the law. Rev. Stat., § 5205. But the statute does not, in terms, make void a subscription or certificate of stock based upon increased capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank. Certainly, the statute should not be so applied in behalf of a person sought to be made liable as a shareholder, when, as, in the present case, he held, at the time the bank suspended and was put into the hands of a receiver, a certificate of the shares subscribed for by him; enjoyed, by receiving and retaining dividends, the rights of a shareholder; and appeared as a shareholder upon the books of the bank which were open to inspection, as of right, by creditors. Rev. Stat., § 5210. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

90. Subscriber to increased issue receiving original stock.—*Stephens v. Follett*, 43 Fed. 842.

91. Acquiescence in change.—A subscriber to an issue of increased stock authorized by a national bank, who

§ 250 (3bc) Fraud or Illegality in Purchase or Transfer of Stock.—Illegal Purchase by Bank of Its Own Stock.—See ante, "Persons Deemed to Be Shareholders for Purpose of Assessment," § 248 (1b).

Agreement to Hold Shares for Bank Itself.—See ante, "Persons Deemed to Be Shareholders for Purpose of Assessment," § 248 (1b).

§ 250 (3bd) Withdrawal or Renewal of Charter.—Shareholders in a national bank which has extended its corporate existence, conformably to Act of July 12, 1882, c. 290, 22 Stat. 162 (U. S. Comp. St. 1901, p. 3457), ceased to be such upon the expiration of the original term of the bank's corporate life, and therefore could not thereafter be chargeable with personal liability for its debts, where they took the steps required of nonassenting stockholders in section 5 of that act by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares.⁹²

§ 250 (3be) Payment of Assessment to Restore Capital Stock.—The payment of an assessment imposed by a bank on its shareholders under Rev. St., § 5205, in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability in the case of liquidation, under § 5151, for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares.⁹³

was given original stock instead, which fact appeared on the face of the certificate and by the books of the bank, who retains such stock, without objection, for three years, and until after the bank has become insolvent, will be presumed to have known and assented to such change, and is precluded from thereafter asking to be relieved from liability as a stockholder on that ground. Decree, *Tillinghast v. Bailey*, 86 Fed. 46, affirmed. *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801.

92. Withdrawal or renewal of charter.—*Apsey v. Kimball*, 221 U. S. 514, 55 L. Ed. 834, 31 S. Ct. 695, affirming judgments *Apsey v. Whittemore*, 199 Mass. 65, 85 N. E. 91, and *Kimball v. Apsey*, 90 C. C. A. 634, 164 Fed. 830.

Where a stockholder in a national bank served notice of withdrawal on a renewal of its charter, as required by Act July 12, 1882, c. 290, § 5, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), appointed an appraiser on his behalf and took all reasonable steps to obtain an appraisal of and payment for his shares as therein provided, and thereafter refused to accept dividends on his stock, he can not be held liable for an assessment, made on the subsequent insolvency of the bank, on the ground of estoppel, although through a failure of

duty on the part of the bank and its officers no appraisal was made, and his name was retained on the stockbook, and because of such failure to act his certificate of stock had not been actually surrendered. *Kimball v. Apsey*, 90 C. C. A. 634, 164 Fed. 830.

93. Payment of assessment to restore capital stock.—*Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39; *Mills v. Butler*, 118 U. S. 655, 30 L. Ed. 260, 7 S. Ct. 47; *Morrison v. Price*, 23 Fed. 217, affirmed in 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

There is no equity which entitles a stockholder to apply the payment which he has made under § 5205 to extinguish his liability under § 5151, resting upon the facts that the money paid by the stockholders under the assessment was in fact applied to the satisfaction of the debts of the bank; that such application was intended by the appellant when the assessment was paid; and that he paid it in the belief that it would exonerate him from further liability as a stockholder, induced by representations made to him to that effect by others interested in the affairs of the bank. Whatever hardship there may be in the circumstances of the case, there is no ground of equitable relief. If the assessment was applied

§ 250 (3bf) Voluntary Liquidation.—Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course.⁹⁴

§ 250 (3bg) Illegality of Receiver's Appointment.—In an action at law by the receiver to enforce statutory liability of a holder of shares of stock in a national bank the stockholders cannot inquire into the legality of the receiver's appointment.⁹⁵

§ 250 (3bh) Suit Conducted by Private or Special Counsel.—The stockholders in an action brought by a receiver of a national bank to enforce their individual liability cannot defend the suit upon the ground that it is prosecuted by private counsel, instead of the district attorney, as directed by the act. That is a question between the United States and its officers, and does not affect the rights of the defendants.⁹⁶

§ 250 (3bi) Failure to Collect First Assessment and Realize on Assets.—The mere fact that the first assessment levied by the comptroller of currency upon the stockholders of an insolvent national bank, if collected, would, together with the bank's assets, if then realize upon, have been sufficient to wipe out all the debts, does not constitute a defense to an action to collect a second assessment levied by the comptroller mainly for the purpose of paying expenses and interest accumulating after the levy of the first assessment.⁹⁷

by the officers of the bank to the satisfaction of its debts, there is nothing to show that it was done ratably, as required by § 5151. The assessment was not paid by the stockholders for the purpose of effecting a liquidation of the affairs of the bank, but was understood to be the price paid for the privilege of continuing its business, in the hope of saving their investment. If it was paid under a mistaken supposition that, in the event of future failure, nothing more could be required of them, there is nothing to show that the shareholders were led into the mistake by any misrepresentations either of fact or of law on the part of the creditors for whose benefit the receiver is now acting. The mistake, if any, is one for which each shareholder is alone responsible. *Delano v. Butler*, 118 U. S. 634, 30 L. Ed. 260, 7 S. Ct. 39.

94. Voluntary liquidation.—Decree, *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

95. Illegality of receiver's appointment.—*Young v. Wempe*, 46 Fed. 354.

96. Conduct of suit by special counsel.—The 50th section of the National Bank Act of June 3d, 1864 (13 Stat. at Large, 116), which provides that suits under it, in which officers or agents of the United States are parties, shall be conducted by the district attorney of the district, is in so far but directory, that it can not be set up by stockholders to defeat a suit brought against them by a receiver, under the act, which receiver, with the approval of the treasury department, and after the matter had been submitted to the solicitor of the treasury, had employed private counsel, by whom alone suit was conducted. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

97. Failure to collect first assessment and realize on assets.—*Beckman v. Hague*, 38 Misc. Rep. 606, 78 N. Y. S. 79.

A receiver of a national bank of Texas sued a domestic stockholder to recover a second assessment levied on his stock, in 1898, by the comptroller of the currency. Defendant had paid an assessment levied in 1894. Had the receiver collected all of such first as-

§ 250 (3bj) Sale or Assignment of Claim by Receiver.—Since the receiver of an insolvent national bank has authority to institute suit on the individual liability of stockholders to collect assessments ordered by the comptroller of the currency, and a satisfaction of a judgment in such suit will release the stockholder from further liability, such a stockholder cannot defend on the ground that the receiver has assigned the claim pending the suit.⁹⁸

Claim Unlawfully Disposed of by Receiver.—It is no defense to a stockholder in an insolvent national bank, who is sued by the receiver on his individual liability upon an assessment ordered by the comptroller of the currency, to say that the receiver has unlawfully disposed of such claim, so that the creditors of the bank will not receive of the proceeds therefore as much as they are entitled to, since the disposition of the fruits of the litigation is not a matter in which the stockholder is concerned.⁹⁹

§ 250 (3bk) Set-Off and Counterclaim—§ 250 (3bka) Counterclaim.—Damages for Fraudulent Representations to Induce Purchase of Stock.—In an action by the receiver of a national bank against a stockholder to recover an assessment, the defendant cannot set up, by way of counterclaim, a claim for damages against the bank for fraudulent representations made to induce his purchase of the stock,¹ and he cannot

assessment, and realized on the assets, all the debts as then existing might have been paid. It did not appear that he could not have done so. He had also sold a large amount of the assets for about 9 per cent of their face value under an order of the federal courts. Held, that these facts constituted no defense. *Beckham v. Hague*, 38 Misc. Rep. 606, 78 N. Y. S. 79.

98. Sale or assignment of claim by receiver.—*Schaberg v. McDonald*, 60 Neb. 493, 83 N. W. 737.

99. Claim unlawfully disposed of by receiver.—*Schaberg v. McDonald*, 60 Neb. 493, 83 N. W. 737.

1. Damages for fraudulent representations to induce purchase of stock.—*Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought by interposing an equitable defense to defeat this action at law

brought by the receiver under the statute. That can not be done, because under the constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted. So, also "if the defendant," the supreme court has said, "have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity." *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; citing *Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 30 L. Ed. 513, 7 S. Ct. 323. See, also, *Bennett v. Butterworth* (U. S.), 11 How. 669, 13 L. Ed. 859; *Thompson v. Central, etc., R. Co.* (U. S.), 6 Wall. 134, 18 L. Ed. 765; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed. 358, 11 S. Ct. 712; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

"The present action is beyond question one at law. Its object is to enforce a liability created by statute for the benefit of creditors who have demands against the bank of which the plaintiff is receiver. The defendant stood upon the books of the bank as a shareholder at the time it was placed in the hands of the receiver and he

maintain a cross-petition in the nature of a counterclaim to recover the purchase price of his stock on the ground of the alleged fraud of the bank inducing its purchase by defendant. The proper proceeding in such case is by an independent bill in equity against both the receiver and the bank for a rescission, making tender of the stock.²

§ 250 (3bkb) Set-Off.—A stockholder of an insolvent national bank, who happens also to be one of its creditors, cannot cancel or diminish the assessment to which the provisions of § 5151, Rev. St., make him liable, by offsetting his individual claim against it,³ although the claim was incurred under an express agreement that it might be so set-off,⁴ but a claim against an insolvent national bank that is of such a nature that the

was accorded the privileges appertaining to that position. He claims exemption from the responsibility attaching to him, under the statute, as a shareholder upon the ground that in consequence of the frauds practiced upon him he was entitled to disaffirm, and that he had upon due notice to the receiver disaffirmed, the contract under which he purchased the stock in question. He seeks to have the certificate received by him treated as cancelled. Clearly such a defense is of an equitable nature, and could not be recognized and sustained except in some proceeding to which the bank, at least, was a party. If the defendant was entitled, under the facts stated, to a rescission of his contract of purchase, and to a cancellation of his stock certificate, and consequently to be relieved from all responsibility as a shareholder of the bank, he could obtain such a relief only by a suit in equity to which the bank and the receiver were parties." *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

The receivers sued in this case for the benefit of creditors who, it must be assumed upon this record, knew nothing of the circumstances under which the defendant became a shareholder. They trusted the bank and those who appeared on the list of shareholders required to be kept by § 5210, Rev. Stat., which list, that section declares, "shall be subject to the inspection of all the shareholders and creditors of the association." *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

2. *Wallace v. Hood*, 89 Fed. 11; *Hood v. Wallace*, 38 C. C. A. 692, 97 Fed. 983. Judgment affirmed in 182

U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

Cross petition in nature of counterclaim.—There is no ground whatever upon which the defendant can have a judgment upon his cross petition or counterclaim against the receiver. That officer had nothing to do with the fraudulent transactions of the bank prior to its suspension. His duty was to take charge of its assets, and have them administered according to the rights of parties existing at the time of such suspension. Whether, if the defendant claimed a judgment against the bank or its officers for the alleged fraud or deceit of the latter officers, he could participate in the distribution of the proceeds of the stock assessment until all the contract obligations of the bank had been met, was not decided by the circuit court of appeals. That question was wisely reserved for decision when it should arise and become necessary to be decided. *Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Hood v. Wallace*, 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

3. **Set-off.**—*Hobart v. Gould*, 8 Fed. 57.

4. **Advances to aid bank in financial crisis.**—Defendant, for the purpose of helping a bank, of which complainant was a stockholder, in a financial crisis, loaned it certain securities belonging to complainant, and when complainant was informed of the fact she did not object. She was assured by the bank's officers that if the bank was saved the securities would be returned, and if it failed the avails would be credited on her assessment as a stockholder. The bank failed, and the securities were not returned. Held, that she was not entitled, as against other creditors, to set off the value of the securities against her assessment, but was, as to such value, on the same footing as

holder would be entitled to receive the full amount before distribution by the receiver to general creditors may be set off in an action by the receiver to recover of the holder thereof an assessment on his shares of stock.⁵

Amount of Deposit at Insolvency of Bank.—A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent.⁶

Distributive Share in Assets.—A stockholder in a national bank in the process of liquidation can not set off his distributive share in the assets against his liability on his stock.⁷

§ 250 (3bl) Compromise by Receiver.—See ante, "Compromising or Compounding Statutory Liability of Stockholder," § 250 (1bad).

§ 250 (4) Parties and Pleading—§ 250 (4a) Parties—§ 250 (4aa) Persons Who May Sue and Parties Plaintiff—§ 250 (4aaa) Involuntary Liquidation.—Receiver Not Creditors.—A receiver appointed to wind up the affairs of a national banking association that has become insolvent is authorized, under the direction of the comptroller of the currency, to enforce the liability of its stockholders, and collect from each of them the necessary amount, up to the extent of his liability, for the payment of the creditors.⁸ The receiver⁹ and not the creditors¹⁰ are the

any other creditor. *Sowles v. Witters*, 39 Fed. 403.

Property delivered to bank by executor.—In an action by a receiver of an insolvent bank to charge the estate of a shareholder with an assessment on his shares, the executor claimed, by way of set-off, that property belonging to the estate had been delivered to the bank, upon the understanding that it should be applied on the assessment if the bank should fail. Held, not a proper subject of set-off, even though the bank examiner assented to the agreement. *Witters v. Sowles*, 32 Fed. 130, 24 Blatchf. 550.

5. Claims superior to those of general creditor.—In an action by the receiver of an insolvent national bank to recover of a stockholder an assessment on his shares, defendant alleged as a counterclaim that the comptroller of the currency had directed the bank to restore the value of certain securities held by it which had been reported worthless by an examiner; that certain of the stockholders, including defendant, had raised a fund, which was placed in the hands of trustees, to apply so much as might be from time to time required by the comptroller to retire such securities; that the fund was deposited with the bank, with full notice of the purpose to which it was to be applied; that a portion had been

used to retire the securities designated, and that when the bank failed, the balance of the fund came into the hands of the receiver, and was now claimed by him as a part of the ordinary assets of the bank; that a certain portion of this balance belonged to defendant, which amount he asked to set off against plaintiff's demand. Held, that a general demurrer, based on the ground that no set-off or counterclaim was available in such an action, would be overruled, as the claim could be set off if it was of such a nature that the holder would be entitled to receive the full amount before distribution by the receiver to general creditors. *Welles v. Stout*, 38 Fed. 807.

6. Amount of deposit at insolvency of bank.—*Wingate v. Orchard*, 21 C. C. A. 315, 75 Fed. 241.

7. Distributive share in assets.—*First Nat. Bank v. Riggins*, 124 N. C. 534, 32 S. E. 801.

8. Receiver not creditors.—*King v. Armstrong*, 50 O. St. 222, 34 N. E. 163.

9. Kennedy v. Gibson (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Under New York Code Civ. Proc., § 449, excepting from the provision that an action must be prosecuted in

10. Creditors not proper parties.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

proper parties plaintiff in an action to enforce the liability of stockholders under the National Bank Act. The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name, it is not necessary to make either a party to the suit.¹¹

Substitution of New Receiver.—In an action by the receiver of a national bank to enforce the stockholders' personal liability, the decree of the lower court dismissing the bill was not made until after the appointment of a new receiver in the place of the one filing the bill, and the appeal to the supreme court was taken in the name of the old receiver, the new receiver not having been substituted as plaintiff. The new receiver became surety in the appeal bond and thus treated the decree as valid and adopted the appeal. The motion of the new receiver in the supreme court to be substituted as plaintiff and appellant in place of the old receiver, without prejudice to the proceedings already had, was granted, and the motion of the appellees to dismiss the appeal, denied, although they and their counsel

the name of the real party in interest a person expressly authorized by statute to sue, the receiver of a national bank may sue for assessments levied on the stockholders, being so authorized by the act of congress relating to national banks. *Peters v. Foster*, 56 Hun 607, 10 N. Y. S. 389, 18 Civ. Proc. R. 380, 32 N. Y. St. Rep. 174.

11. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307; *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

"A national bank is an instrumentality of the United States, its circulating notes guaranteed by the United States, and if the United States should be compelled to pay them the United States has a paramount lien on the assets of the bank for reimbursement. The administration of the bank's assets is, therefore, vested in the comptroller of the currency as an officer of the United States. He appoints the receiver and directs his acts. The individual liability of a stockholder can

only be enforced by his order. The provision is as much for the benefit of the stockholders as for the United States, and it is indispensable to the bringing of a suit against the stockholder. In other words, the liability dates from the order of the comptroller." *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29. See, also, *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, 26 S. Ct. 502.

"The Act of 1863 made no provision for enforcing the personal liability of shareholders, while that of 1864 provided that it might be done through a receiver appointed by the comptroller, and acting under his direction. *Id.*, § 5234." *United States v. Knox*, 102 U. S. 492, 26 L. Ed. 216. See *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476, for provisions of § 50 of the Act of 1864.

Violation of duty by receiver.—"If the receiver intends to violate, or shall violate, his duty in discharging the trust confided to him, the remedy must be sought in another proceeding." *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307.

first heard of the new appointment from the papers served on the motion for substitution.¹²

§ 250 (4aab) Voluntary Liquidation.—Creditor.—Under the Act of June 30, 1876, providing that, when any national banking association shall have gone into liquidation under the provisions of Rev. St., § 5220, the individual liability of the shareholders, provided for by § 5151, may be enforced by any creditor by a bill in equity in the nature of a creditor's bill on behalf of himself and all other creditors, against the shareholders, in any court of the United States having original jurisdiction in equity, for the district in which such association may have been located, no new liability on the part of the stockholders was created, nor did such act provide for enforcing such liability against stockholders under circumstances not permitting its enforcement before the act was passed.¹³

Agent in Charge of Liquidation.—An agent chosen by stockholders to take charge of the business of a national bank in liquidation can not, after all debts have been paid, enforce the individual liability of stockholders, under Rev. St., §§ 5151, 5234, as he has no greater powers than those conferred upon the receiver.¹⁴

Trustee in Voluntary Liquidation.—A trustee appointed by the shareholders of a national bank which has gone into voluntary liquidation to conduct the business of liquidation has no authority to enforce the individual liability of shareholders.¹⁵

Receiver Subsequently Appointed by Comptroller.—When a creditor of a national bank has brought suit to enforce the individual liability of stockholders under the Act of Congress of June 30, 1876, authorizing such suit where the bank had gone into voluntary liquidation, a receiver subsequently appointed by the comptroller can not bring suit for the same purpose against a stockholder who has been joined in the other.¹⁶

§ 250 (4ab) Defendants.—All the stockholders need not be made codefendants.¹⁷

Joinder of Stockholders in Suit in Equity.—The receiver of an insolvent national bank may maintain a suit in equity to enforce an assessment

12. **Substitution of new receiver.**—*Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

13. **Creditor.**—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

14. **Agent in charge of liquidation.**—*Church v. Ayer*, 80 Fed. 543.

15. **Trustee in voluntary liquidation.**—*Williamson v. American Bank*, 109 Fed. 36, affirmed in 52 C. C. A. 1, 115 Fed. 793.

16. **Receiver subsequently appointed by comptroller.**—*Harvey v. Lord*, 10 Fed. 236.

17. **Stockholders.**—When contribu-

tion only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection to such a bill properly filed against stockholders within the jurisdiction of the court, that stockholders named in the bill, and averred in it to be without the jurisdiction, are not made co-defendants. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Joinder of stockholders in suit in equity.—*Decree, Tillinghast v. Bailey*, 86 Fed. 46, affirmed. *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801.

against stockholders, where such assessment is less than the full amount of their liability; and, where the question of law involved is common as to a number of the stockholders, and rests upon substantially the same facts, they may be joined as defendants.

Nonresident Stockholders.—It is no objection to a bill brought by a receiver to enforce the individual liability of stockholders in national bank that some persons who are shown by the bill to be stockholders, but to be resident without the jurisdiction of the court and who can not, for that reason, be served with process, are not made parties.¹⁸

Executor.—Executors vested with the title to shares of stock in a national bank belonging to their testator should be sued in their capacity as executors by the receiver of the bank seeking to enforce an assessment duly made by the comptroller of the currency, and not as trustees, although they had, in fact, transferred the shares to themselves as “trustees.”¹⁹

§ 250 (4b) Pleading—§ 250 (4ba) Bill, Petition or Complaint—§ 250 (4baa) Involuntary Liquidation.—Assessment by Comptroller and Necessity Therefor.—In an action by the receiver of a national bank against its stockholders to enforce their individual liability the fact that the comptroller made an assessment and ordered the proceedings against the stockholders must be distinctly averred, and, if put in issue, must be proved,²⁰ but it is not necessary to allege that there was a necessity therefor.

18. Nonresident stockholder.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

19. Executor.—*Earle v. Rogers*, 105 Fed. 208.

A testator directed by his will that a daughter's share in his estate should remain in the hands of his executors, and be invested by them, and the income paid to the daughter during her life, and at her death the part of the estate so “held in reserve” by the executors should revert to the general estate. The executors set apart as a portion of the daughter's share certain shares of stock in a national bank held by the testator, and caused the same to be transferred on the books of the bank to themselves as “trustee.” Held, that the legal title to such shares devolved upon them as executors, and they had no power to divest themselves of such title by any transfer, and that an action to recover an assessment on the stock was properly brought against them as executors, and especially where the assessment was not made until after the daughter's death. *Earle v. Rogers*, 105 Fed. 208.

20. Allegation of assessment by

comptroller or grant of leave to sue.—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Rankin v. Barton*, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29; *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463; *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

A bill filed under § 50 of The National Bank Act of 1864 (13 Stat. 116), by a receiver of a national bank, to enforce the individual liability of stockholders, which does not aver any action by the comptroller determining a necessity for the proceeding, is bad upon demurrer. The receiver is the instrument of the comptroller. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indis-

Bill or Complaint against Executor.—Where a bill in a suit brought by the receiver of a national bank, to charge the assets of the estate of a testator, in the hands of the executor and devisees and legatees, with an assessment on certain shares of the capital stock of the bank, was framed so as to charge the defendant, with the assets in his hands as legatee, with the payment of the assessment on the testator's stock, he could not be charged in the action as owner of the stock.²¹

pensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Upon a bill filed under the 50th section of the National Bank Act of 1864 by a receiver, against the stockholders, where the bank fails to pay its notes, it is indispensable, that action on the part of the comptroller of the currency, touching the personal liability of the stockholders, precede the institution of any suit by the receiver, and the fact must be averred in the bill. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Sufficiency of allegation.—In an action by the receiver of a national bank against a shareholder to recover an assessment ordered by the comptroller, an allegation in the petition that on a day named "the comptroller of the currency, in order to pay the liabilities of" the bank, "made an assessment upon all the said shares of the capital stock of said" bank of 100 per cent upon its par value, "and ordered the stockholders to pay the same on or before" a day named, is sufficient to show that the requisite action was had by the comptroller, not only as to determining upon the necessity of an assessment, but also as to the enforcement thereof by suit against the delinquent stockholders. *Welles v. Stout*, 38 Fed. 67.

An allegation following, "that by virtue of the premises, and of the statutes in such case made and provided, the defendant became and is indebted to your petitioner in the sum of," etc., sufficiently shows that defendant had become indebted in the sum named, and also that such indebtedness still continued when the petition was filed, and is equivalent to an allegation of nonpayment. *Welles v. Stout*, 38 Fed. 67.

In an action by the receiver of a national bank to enforce the individual

liability of a stockholder, an allegation in the complaint that on a given date the comptroller, having ascertained and determined that the assets, property, and credits of the bank were insufficient to pay its debts and liabilities, and as provided by the act of congress, made an assessment and requisition on the shareholders of the said bank of a given sum upon each share held and owned by them, respectively, at the time of its default, and directed the receiver to take all necessary steps to enforce the liability, is sufficient. *Nead v. Wall*, 70 Fed. 806, distinguishing *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

The contention, that no cause of action arises until a demand has been made, is fully met by the allegation of the bill that on June 10, 1893, the comptroller of the currency made an order in which he declared that he had made an assessment and requisition upon the shareholders, "and that he did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, 22 S. Ct. 297, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344, 23 S. Ct. 845.

21. Married woman's capacity to become stockholder.—A bill in equity by a receiver of an insolvent national bank, against a married woman to enforce her individual liability on stock of the bank owned by her, along with her husband, out of her separate property, was not defective in not alleging that, at the time she became a stockholder, she had the capacity to become a stockholder. It alleges that, at the time the bank suspended, she "was the owner" of the shares. This is an allegation that she was then the lawful owner of those shares, and had lawfully become such owner, with the capacity to become such owner at the time she became such owner. It is consistent with this allegation, that

Capacity of Married Woman to Become Stockholder.—In proceeding against a married woman, it need not be expressly alleged, in addition to averring her ownership, that she had the capacity to become a stockholder when she became such.²²

Averment of Capital Stock of Bank.—A complaint in an action by the receiver of a national bank to recover an assessment from a stockholder sufficiently shows the capital stock of the bank, although not directly alleged, where it alleges that there were 500 shares, of the par value of \$100 each, and that the assessment was made ratably, at \$100 per share, and amounted to \$50,000.²³

§ 250 (4bab) Voluntary Liquidation.—A bill in equity to enforce the liability of stockholders in a national bank upon its insolvency where it goes into voluntary liquidation is not multifarious because it combines the subjects of applying the assets of the bank and enforcing the liability of a stockholder.²⁴

Averment That Bill for Benefit of All Creditors.—The bill contemplated by the second section of the act of June 30, 1876, to enforce the individual liability of stockholders in a national banking association that has gone into liquidation, need not purport expressly on its face to be filed by the complainant on behalf of himself and all other creditors, for the law would give it that effect, and the court would so treat it;²⁵ but if this was

she may have owned the shares before she married, or that, when she became such owner, if she was then married, she had the right to become such owner, by virtue of the laws of the state, where the bank was located, in connection with the provisions of the statutes of the United States in regard to national banks. *Bundy v. Cocke*, 128 U. S. 185, 32 L. Ed. 396, 9 S. Ct. 242.

22. Averment of capital stock of bank.—*McClaine v. Rankin*, 56 C. C. A. 160, 119 Fed. 110, reversed in 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

23. In an action by the receiver of a national bank against its stockholders to collect an assessment made by the comptroller of the currency the complaint need only allege that the comptroller determined that the assessment was necessary and levied it, since such an assessment is conclusive as against the stockholders. *Young v. Wempe*, 46 Fed. 354.

Allegation of necessity for act of comptroller.—The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the comptroller of the treasury, need not aver that there was a necessity

therefor, or that the comptroller determined that there was such necessity, though the law provides that the comptroller may enforce the individual liability of the stockholders, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the comptroller made the assessment and directed its enforcement. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227.

Bill or complaint against executor.—*Witters v. Sowles*, 32 Fed. 130, 24 Blatchf. 550.

24. Multifariousness.—"The bill is not multifarious. 'The two subjects of applying the assets of the bank and enforcing the liability of a stockholder, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank.' *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788." *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

25. Averment that bill for benefit of all creditors.—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

A bill filed under the United States statute of June 30, 1876, by a creditor of a national bank against stockhold-

necessary, the bill might be amended in that respect by leave of the court.^{25a}

Amended Bill.—An amended bill may be filed in a suit in the nature of a creditors' suit, brought to obtain a judicial administration of the affairs of a national bank which has voluntarily gone into liquidation, where not a departure from the case stated in the original bill and sufficiently germane thereto not to be multifarious or foreign to its general purposes.²⁶

ers of such bank to enforce their individual liability, is for the benefit of all creditors of the bank, although it does not contain an averment of that fact. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591.

25a. Amendment.—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

26. Amended bill.—A bill was filed by a judgment creditor against a national bank, alleging the recovery of a judgment and execution thereon unsatisfied; that the bank had suspended and gone into voluntary liquidation under the charge of its president; that such president had converted its assets to his own use and that of others, in violation of his trust and in fraud of creditors, to create preferences, and was otherwise dissipating and squandering them; that the capital stock amounted to a stated sum and was owned by named stockholders in specified amounts; it prayed for a full discovery of all the transactions of the president in reference to the affairs of the bank since its suspension, and all the assets of the bank since he had been in possession and control, and what disposition had been made thereof; and that all sales and conveyances made by the bank or the president be set aside as fraudulent, and all its property in its possession or the president's be delivered up to the court and applied to complainant's judgment so far as necessary; for an injunction against any further transfers of the assets; for the appointment of a receiver with the general powers of receivers in like cases; and, for general relief. It was held that the bill was not strictly and technically a creditor's bill merely for the purpose of subjecting equitable assets to the payment of complainant's judgment, although that was a part of its purpose, but it's main purpose was to obtain a judicial administration of the affairs of the bank on the ground that its capital stock and property was a trust fund for its creditors, it being insolvent and in liquidation, and that under the management of its officers and

directors this trust was being violated and perverted. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

An amended bill was filed, after the resources of the bank discovered and delivered to the receiver had been exhausted, which set out the names of all the stockholders with their holdings, charging that certain of them combined with the president to commit a fraud upon the creditors of the bank by surrendering and transferring their shares of stock in exchange for a portion of the assets applicable to debts, and praying as part of the relief that these transactions be inquired into and set aside, the assets so received be delivered up and applied to debts, and account be taken of all the indebtedness of the bank and the amounts due from each of the defendants to the creditors under their statutory individual liability. This amended bill, although in some respects a departure from the case stated in the original bill, was held sufficiently germane to the original bill not to be multifarious, or inappropriate or foreign to its general purposes, and that the various matters of the amended and original bills were connected together in such way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

The amendment made at the hearing, whereby the amended bill was changed so as to state that it was filed by the complainant on behalf of himself and all other creditors, was purely formal and properly permitted for the purpose of making the bill explicitly to conform to all that had taken place previously in the progress of the cause. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

The action of the circuit court in permitting these amendments is justified by the rules on that subject as stated by this court in the case of *Neale v. Neales* (U. S.), 9 Wall. 1, 19 L. Ed. 590; in *Tremolo Patent* (U. S.), 23 Wall. 518, 23 L. Ed. 97; and

§ 250 (4bb) Answer.—An answer seeking to rescind a subscription to stock of an insolvent national bank, on the ground that it was obtained by fraud, must show that the creditors for whose benefit the assessment sought to be enforced was levied did not become such during the time defendant held such stock, and allege facts showing that defendant has not been guilty of laches,²⁷ but has used diligence to discover the fraud.²⁸

§ 250 (5) Evidence.—The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank.²⁹

Bona Fides of Transferrer.—In a suit by the receiver of a national bank to charge a former stockholder, evidence that her husband knew the failing condition of the bank, and of statements by her that she always consulted him in business matters, is insufficient to prove that she transferred her stock for the fraudulent purpose of escaping liability thereon, as against her positive testimony that she made the transfer in good faith as an advancement to her daughter, and without knowledge or notice that the bank was embarrassed.³⁰

Solvency of Transferee.—One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder under Rev. St., U. S., § 5151 [U. S. Comp. St. 1901, p. 3465], for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment.³¹

Estoppel of Pledgee to Deny Ownership.—In an action by the receiver

Hardin v. Boyd, 113 U. S. 756, 28 L. Ed. 1141, 5 S. Ct. 771; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

A judgment creditor of a national bank filed a creditors' bill to enforce payment of his judgment, and the court appointed a receiver. Pending the proceedings, congress, by Act June 30, 1876, amending the national banking law, provided that stockholders' individual liability could be enforced by any creditor by a bill in equity in the nature of a creditors' bill. Held, that complainant in the pending suit could, after passage of the act, amend his bill so as to make a case for the enforcement of the stockholders' individual liability. *Harvey v. Lord*, 10 Fed. 236.

27. Answer.—*Wallace v. Bacon*, 86 Fed. 553.

28. Diligence to discover fraud.—*Wallace v. Bacon*, 86 Fed. 553.

A national bank went into liquidation November 30, 1896. An action

against a stockholder to enforce an assessment was commenced November 9, 1897. Defendant's answer set up in detail the fraud by which he had been induced to subscribe and pay for the stock, alleged that he had ever since been a resident of a distant state, and that, until a short time before the filing of the complaint, he had no opportunity of discovering the fraud. Held, that diligence was not shown. *Wallace v. Bacon*, 86 Fed. 553.

29. Evidence.—Judgment, 46 C. C. A. 498, 107 Fed. 639, 60 L. R. A. 266, affirmed. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

30. Bona fides of transferrer.—*Sykes v. Holloway*, 81 Fed. 432.

31. Solvency of transferee.—Decree 67 C. C. A. 408, 134 Fed. 528, reversed. *McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Burden of proof on transferrer.—*McDonald v. Dewey*, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

of a national bank to recover an assessment from the defendant as a stockholder, where it is admitted to prove that defendant is in fact merely a pledgee of the stock, the burden rests upon the plaintiff to show that defendant, by reason of having knowingly permitted the stock to stand in his name as owner upon the books of the bank, is estopped to deny such ownership as against its creditors.³² Where the right of the receiver to recover from a pledgee of national bank stock rests upon the theory that the acts of the pledgee amount to a conversion thereof the burden is on the receiver to negative the consent of the pledgor.³³

Direction of Comptroller to Sue.—The fact that the comptroller of the currency has ordered proceedings against the stockholders of an insolvent national bank to enforce their individual liability must not only be averred but if put in issue must be proved. A letter addressed to the receiver of a national bank, and signed by the comptroller of the currency, directing the receiver to institute legal proceedings to enforce, against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, under the statute, is sufficient evidence that the comptroller decided, before the suit was brought, that it was necessary to enforce the personal liability of the stockholders.³⁴

Notice of Demand.—The testimony of a witness that in his capacity as receiver of a national bank he made personal demand upon a stockholder for the payment of an assessment, and that the stockholder admitted having received notice thereof, where uncontradicted, sufficiently shows notice and demand to support an action to recover the assessment.³⁵

Number of Shares Belonging to Stockholder.—In a proceeding to enforce the individual liability of the shareholders of an insolvent national

32. Estoppel of pledgee to deny ownership.—*Tourtlot v. Stolteben*, 101 Fed. 362.

33. Proof that act of pledgee a conversion.—Defendant held shares of stock in a national bank as collateral security. The bank was subsequently consolidated with another national bank, and stock of the latter was issued in lieu of the stock of the former. Defendant surrendered the shares it held, and caused stock in the consolidated bank to be issued in lieu thereof in the name of an employee, but continued to hold the same as security for the original debt. Held, in an action by the receiver of the consolidated bank to recover an assessment from defendant, in which he alleged that defendant had purchased and become the owner of the stock, on the theory that its having caused the substituted stock to be issued amounted to a conversion of the collateral, that the burden rested on the

plaintiff to prove that the exchange was made without the consent of the pledgor. *Wilson v. Merchants' Loan, etc., Co.*, 39 C. C. A. 231, 98 Fed. 688, affirmed in 183 U. S. 121, 46 L. Ed. 113, 22 S. Ct. 55.

34. Direction of comptroller to sue.—*Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

A letter of the comptroller of the currency to the receiver of a national bank, directing the receiver to institute legal proceedings to enforce the personal liability of stockholders, is not evidence in such a suit by the receiver that the debts of the bank exceed 100 per cent of its assets, so as to render a stockholder liable. *Bowden v. Morris*, Fed. Cas. No. 1,715, 1 Hughes 378.

35. Notice of demand.—*McClaine v. Rankin*, 56 C. C. A. 160, 119 Fed. 110, reversed in 197 U. S. 154, 49 L. Ed. 702, 25 S. Ct. 410.

bank, where defendants have answered, admitting that they were such shareholders, but not admitting the number of shares held by them, respectively, the stock ledger, the stubs of the stock certificates, and the dividend sheets, all showing the number of shares standing in their names, and on which they respectively drew the last dividends, are prima facie proof of the number of shares so held, and, unless rebutted, sufficient.³⁶

Deduction of Capital Stock.—In an action by the receiver of an insolvent bank against the executrix of a deceased shareholder to recover assessment on the stock, the certificate of the comptroller of the currency, issued to a national bank, approving a reduction of its capital stock, is in itself proof of such reduction.³⁷

Assignment by Receiver.—Where, in an action by an assignee of a national bank receiver to enforce the personal liability of a stockholder, it appears that the claim was sold and transferred by the receiver to plaintiff, and that plaintiff is the owner thereof, it will be presumed that whatever formal steps were necessary to make such transfer valid were taken, including any step required by Rev. St. U. S., § 5234, providing that a national bank receiver, upon order of the court, may sell or compound all bad or doubtful debts, and, on like order, may sell the personal property of such association on such terms as the court may direct.³⁸

§ 250 (6) Trial and Judgment—§ 250 (6a) State Laws as Rules of Decision in Federal Courts.—See ante, "Right of Receiver to Sue," § 250 (1bab).

§ 250 (6b) Judgment—§ 250 (6ba) Validity, Form and Sufficiency.—No decree should be made discharging from liability stockholders who are not parties and whose liability is not in issue.³⁹

§ 250 (6bb) Operation and Effect.—Not a "Bad or Doubtful Debt."—A judgment recovered by the receiver of an insolvent national bank against a stockholder on an assessment made by the comptroller, although uncollectible, is not a "bad or doubtful debt" which a court may authorize the receiver to compound, under Rev. St., § 5234.⁴⁰

36. Number of shares belonging to stockholder.—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

37. Reduction of capital stock.—*Brown v. Ellis*, 103 Fed. 834.

38. Assignment by receiver.—*Wal-dron v. Alling*, 73 App. Div. 86, 76 N. Y. S. 250.

39. Validity, form and sufficiency.—The holder of the notes of an insolvent bank, the stockholders whereof are liable for so much of the just claims of creditors as remain unpaid after the assets of the bank shall be exhausted, filed a bill in equity to wind up the affairs of the institution under the pro-

visions of its charter. The stockholders were not made parties, nor served with process; nor was any motion, petition, or prayer, filed to subject them to liability. Held, that so much of the final decree as discharged them from all liability for and on account of any debt or demand against them or the bank was erroneous, as their liability was not put in issue. It can not stand in the way of proceeding against the stockholders and should be set aside. *Terry v. Commercial Bank*, 92 U. S. 454, 23 L. Ed. 620.

40. Not a "bad or doubtful debt."—*In re Earle*, 96 Fed. 678.

Judgment against Guardian.—A judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of an assessment upon shareholders to pay debts, upon which execution was directed to issue, to be levied of the estate of the wards, was not a personal judgment against the wards, and can not be enforced against an estate subsequently inherited by them, and which never came to the hands of the guardian.⁴¹

Effect on Right to Sue on Successive Assessment.—A judgment in favor of the receiver of an insolvent national bank for the recovery of an assessment made by the comptroller on a shareholder does not preclude him from maintaining a second action against the same shareholder for another assessment which had not been made when the first action was commenced; for the contract of a shareholder of a national bank with the bank and its creditors as to its debts is that, to an amount not exceeding the par value of his shares of stock and not exceeding his equal and ratable proportion, he shall pay, in such amounts as the comptroller of the currency shall demand, the debts of the bank.⁴²

§ 250 (7) Liability for Costs.—In proceedings against the stockholders of a national bank that has gone into liquidation, to ascertain and recover assessments for the indebtedness, the stockholders are liable for cost as if they were co-defendants in any ordinary action.⁴³

§ 251. Election or Appointment of Officers.—A national banking association has power to elect or appoint directors, and by its board of di-

41. **Judgment against guardian.**—*Clark v. Ogilvie*, 111 Ky. 181, 23 Ky. L. Rep. 552, 63 S. W. 429.

42. **Effect on right to sue on successive assessment.**—*Deweese v. Smith*, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971.

Under Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3465], providing that the shareholders of every national banking association shall be held individually responsible equally and ratably for all contracts and debts of the association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares, the contract of a shareholder of a national bank with the bank and its creditors as to its debts is that, to an amount not exceeding the par value of his shares of stock and not exceeding his equal and ratable proportion, he shall pay, in such amounts as the comptroller of currency shall demand, the debts of the bank; and hence a judgment in favor of the receiver of an insolvent national bank for the recovery of an assessment made by the comptroller on a share-

holder does not preclude him from maintaining a second action against the same shareholder for another assessment which had not been made when the first action was commenced. *Deweese v. Smith*, 45 C. C. A. 408, 106 Fed. 438, 66 L. R. A. 971.

The purpose of the provisions of the national banking law relating to liability of stockholders is that, in case of the insolvency of the bank, its shareholders shall be liable for its debts to the extent of the amount of their stock, and the law is to be construed in view of such purpose. The comptroller has power to order successive assessments, in the aggregate within the limit of the stockholders' full liability; and this power cannot be affected, and the purpose of the law defeated, by the fact that a receiver, in enforcing a first assessment, has sued at law rather than in equity, and has recovered a judgment which has been satisfied. *Studebaker v. Perry*, 43 C. C. A. 69, 102 Fed. 947, affirmed in 184 U. S. 258, 46 L. Ed. 528, 22 S. Ct. 463.

43. **Liability for costs.**—*Irons v. Manufacturers' Nat. Bank*, 36 Fed. 843.

rectors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.⁴⁴ The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the comptroller of the currency to commence the business of banking; and afterwards at meetings to be held on such day in January of each year as is specified therefor in the articles of association.⁴⁵ Any vacancy in the board of directors is to be filled by an appointment by the remaining directors and any director so appointed holds his place until the next election.⁴⁶

Right to Vote for Director.—The past due and unpaid liability of a shareholder, which disqualifies him from voting at an election of directors of a national bank, is limited to his liability for unpaid subscriptions to stock.⁴⁷ After the expiration of the term of its charter, the stock of a national banking association is not transferable, so as to give the transferee the right to share in the election of directors.⁴⁸

Trial of Right to Office.—An information in the nature of a quo warranto will not lie in a state court to try the right to the office of director in a bank organized under the National Currency Act.⁴⁹

Term of Office.—Subject to the free exercise by its board of directors of its power to remove him at its pleasure, a national bank may fix the term of office of its president or other officer, though during that term he is subject to recall.^{49a} Directors of national banks hold offices for one year and until their successors are elected and qualified.⁵⁰ The office of

44. Election of officers.—Rev. Stats., § 5136, 5 Fed. Stats., 82.

Even if provisions of articles of association and by-laws of the board of directors of a national bank, restricting the power of removal of the president to a two-thirds' vote, was void under Rev. St., § 5136 (U. S. Comp. St. 1901, p. 3455), other terms of the provision that the board should elect one of its members president who should hold office for the term for which he was elected a director were valid. *Rankin v. Tygard*, 198 Fed. 795.

As to officers of banks generally, see ante, "Election or Appointment, Qualification, and Tenure," § 51.

45. Rev. Stats., § 5146, 5 Fed. Stats., 104; *United States v. Britton*, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525.

46. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

47. Right to vote.—Rev. St., § 5144; *United States v. Barry*, 36 Fed. 246.

48. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

49. Trial of right to office.—The amended currency Act of 1864, § 57, providing that suits against national banks may be instituted in both the federal and state courts, does not confer upon the state courts jurisdiction to try the right to the office of director in a national bank on an information in the nature of a quo warranto. *State v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263.

49a. Rev. St., § 5136; *Rankin v. Tygard*, 198 Fed. 795.

50. Term of office of director.—Rev. Stats., § 5145; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, affirming 30 Fed. 298.

A director appointed to fill a vacancy holds office until the election and qualification of his successor. Rev. St., § 5148. See *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

As to right to resign, see post, "Resignation and Removal of Officers," § 251(1/3).

cashier of a national bank is not an annual office, but the term of the incumbent continues until he resigns or until he is removed or a successor is appointed by the board of directors of the bank. He holds office subject to the pleasure of the board of directors. The directors can not bind themselves to a fixed term by a by-law.⁵¹ But they may employ a solicitor of business for a year.⁵²

§ 251½. Qualifications of Officers.—Every director is obliged to own in his own right at least ten shares of the capital stock, and if he ceases to own the required number of shares or become in any other manner disqualified, he thereby vacates his place.⁵³ After the expiration of its charter, the stock of a national bank is not transferable so as to make the transferee a stockholder and eligible as a director.⁵⁴ A national bank director must be a citizen of the United States, and three-fourths of the board must reside in the state or territory or district, and have resided there for a year.⁵⁵ The fact that a director of a national bank, whose presence was necessary to constitute a quorum at a meeting where, by the action of the directors, in which he participated, a contract by the bank to assume and

51. Term of office of cashier.—Since the National Bank Act expressly provides that the cashier of a national bank shall hold his office subject to the pleasure of the board of directors, a by-law providing that a cashier shall hold his office for one year, and shall be elected annually, is nugatory, as is a reappointment in accordance with such by-law at the beginning of each year. *Westervelt v. Mohrenstecher*, 22 C. C. A. 93, 76 Fed. 118, 34 L. R. A. 477.

52. Term of office of solicitor.—A "solicitor of business" is not within the clause "and other officers," in Rev. St. U. S., § 5136 (U. S. Comp. St. 1901, p. 3455), giving a national bank power to appoint a president, vice president, cashier, and other officers, and dismiss such officers at pleasure; but under subdivisions 3 and 7 of said section; empowering such a bank to make contracts and to exercise, by duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the banking business, it may employ a solicitor of business for a year. *Case v. First Nat. Bank*, 59 Misc. Rep. 269, 109 N. Y. S. 1119.

53. Director to own ten shares of stock.—Rev. St., § 5146; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

"The meaning of § 5146 is that every director must own in his own right, during his whole term of service, at least ten shares of the stock; and that

if he does not own such ten shares, he can not become or continue a director." *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

Controlling interest.—"A director need only own ten shares of the stock. Rev. Stat., § 5146. The directors together need not necessarily own the controlling interest in the bank." *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

54. Richards v. Attleborough Nat. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781, decided under Rev. St., § 5145.

55. Residence and citizenship.—Section 5146, United States Rev. Stat., provides that every director must be a United States citizen, and at least three-fourths of the directorate must be residents, during their tenure of office, of the state, territory or district where bank is, and must have been such for one year immediately prior to election. One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

pay the liabilities of another bank was ratified, was also a stockholder in such other bank, in the absence of any allegation of fraud in the transaction, is not sufficient to render the contract invalid.⁵⁶ The board of directors of a national bank may by a by-law restrict their choice of a president to its own members, even if others are eligible under the national banking law.⁵⁷

§ 251 $\frac{1}{3}$. Resignation and Removal of Officers.—Since the national banking law is silent as to the time when and method by which a director may resign, the common law governs, and where a director verbally resigns to the president, to whom he at the same time sells his stock, giving a power of attorney to transfer it on the books of the bank, which is done.⁵⁸ The resignation of the director is effective to release the director from responsibility for the subsequent conduct of the bank's affairs.⁵⁹ The directors of a national bank have power to remove the president, both under the act of congress relative to national banks and under the articles of association, where such articles give express authority to remove; and it makes no difference that the bank has never adopted any by-laws.⁶⁰ The cashier may be removed at the pleasure of the directors.⁶¹

§ 252. Rights and Liabilities of Officers—§ 253. — Nature and Extent—§ 253 (1) President.—The only duties imposed on the president of a national bank are to certify payments on the capital stock of the association,⁶² to cause to be kept in the office where the business of the association was transacted a list of the shareholders;⁶³ and to verify by his oath the general reports made by the association to the comptroller of the currency,⁶⁴ and the reports of dividends declared.⁶⁵ It not being averred that the president was the duly authorized officer or agent of the association, whose duty it was to look after the accounts of depositors, to apply the sums standing to their credit to the payment of their obligations

56. *Schofield v. State Nat. Bank*, 38 C. C. A. 179, 97 Fed. 282.

57. *Rankin v. Tygard*, 198 Fed. 795.

58. **Resignation.**—Rev. St., § 5145, providing that directors of national banks shall hold office for one year, and until their successors have been elected and qualified, does not prohibit resignations within the year. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, affirming 30 Fed. 298.

59. **Release of responsibility for conduct of bank.**—*Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, affirming 30 Fed. 298.

A director of a national bank, who, before the expiration of his term, sells his stock, and orally resigns his office to the president, in his place of president at the bank, and afterwards receives the money for his stock, prior to

the sustaining of losses by the bank, ceases to be a director, and can not be held liable for subsequent losses caused by the negligence of the directors. *Movius v. Lee*, 30 Fed. 298.

60. *Taylor v. Hutton* (N. Y.), 43 Barb. 195, 18 Abb. Prac. 16.

61. *Westervelt v. Mohrenstecker*, 22 C. C. A. 93, 76 Fed. 118, 34 L. R. A. 477.

62. **Rights and liabilities of officers.**—Rev. Stats., § 5140.

As to officers generally, see ante, "Rights and Liabilities as to Bank and Stockholders," §§ 53-55; "Liability of Directors and Officers to Third Persons," §§ 56-58.

63. Rev. Stats., § 5210.

64. Rev. Stats., § 5211.

65. Rev. Stats., § 5212.

to the association, or to prevent the withdrawal or transfer of their deposits while they continued indebted to the association, or that he was even charged with a general superintendence of the affairs of the association, until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the business of the association, the presumption is that it was the duty of the board of directors.⁶⁶ But there are many acts which the president of a bank may do without express authority of the board of directors, either because the usage of that bank impliedly authorized them, or because such acts were fairly within the ordinary routine of his business as president.⁶⁷ The president of a national bank, being in failing health, was anxious to resign his position, but, at the suggestion of a majority of the directors, consented to take a year's leave of absence, and during such absence, and, without any fault on his own part, losses were sustained by the bank, and it became insolvent. In a suit by the receiver to charge the directors with such losses, the president is not liable.⁶⁸

§ 253 (2) Directors—§ 253 (2a) In General.—To Bank.—Directors of a national bank can not be made to respond to damages or to pay excessive loans, unless some injury was done to the bank or loss sustained by reason thereof.⁶⁹ The president of a national bank, who requests the cashier to make advances to a minor, verbally promising that he will see them repaid, is liable to the bank for any loss sustained by reason of said loans, as having been guilty of a breach of trust.⁷⁰

For Ordinary Care.—It is the duty of directors of a national bank to exercise reasonable control and supervision over its affairs, and to use ordinary care and diligence in ascertaining the condition of its business, which is such care as an ordinarily prudent and diligent man would exercise in view of all the circumstances.⁷¹ If nothing has come to the knowledge of

66. *United States v. Britton*, 108 U. S. 193, 198, 27 L. Ed. 703, 2 S. Ct. 525.

Power to draw checks for bank.—“There can be no doubt that the president of a national bank, *virtute officii*, has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president. Indeed, the statutes expressly provide that the powers of the president of a national bank may be defined by the board of directors. Rev. Stat., § 5136. True it is, that by a course of dealing with a particular person, the power of an officer to perform a particular act may be implied when such power is not inconsistent with law. *Merchants' Nat. Bank v. State Nat. Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008.” *Putnam v. United States*, 162 U. S. 687, 713, 40 L. Ed. 1118, 16 S. Ct. 923.

67. **Implied authority.**—*American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

Where the board had allowed the president to conduct almost the entire business of the bank for fourteen years, although there was no formal resolution authorizing it, it must be held that he was duly authorized so to act. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

68. *Movius v. Lee*, 30 Fed. 298, affirmed in 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

69. **Directors.**—*Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A., N. S., 738.

70. *Brown v. Farmers', etc., Nat. Bank*, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359.

71. **Liability for ordinary care.**—*Ran-kin v. Cooper*, 149 Fed. 1010; *Gibbons*

the directors of a national bank to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is all that is required of them, but if, on the other hand, they know, or by the exercise of ordinary care should know, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible.⁷²

For Bad Judgment.—Bad judgment on the part of the directors, as to the condition of the assets, without bad faith, does not make them individually liable.⁷³

For Property Taken in Payment for Debt.—Where a national bank acquired certain mill property, in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mills as the bank's agent, using its funds, and operated them for the bank at a loss, the directors of the bank participating are liable to the creditors for the loss.⁷⁴

Under State Statute and at Common Law.—State laws in regard to bank officers do not apply to officers of national banks.⁷⁵ But the provisions of the National Banking Act defining the duties of the directors of such banks do not relieve them from their common-law liability for a failure to diligently and honestly discharge their trust.⁷⁶

§ 253 (2b) For Particular Acts.—Acts within Scope of Authority.—The rule that the act of an agent within the scope of his authority is the act of the principal, applies to officers of national banks and exempts

v. Anderson, 80 Fed. 345; *Warner v. Penoyer*, 91 Fed. 587, 44 L. R. A. 761, reversing 82 Fed. 181; *Witters v. Sowles*, 31 Fed. 1; *Movius v. Lee*, 30 Fed. 298, affirmed in 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; *Robinson v. Hall*, 12 C. C. A. 674, 63 Fed. 222, reversing 59 Fed. 648; *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572; *Hanna v. People's Nat. Bank*, 35 Misc. Rep. 517, 71 N. Y. S. 1076, modified in 179 N. Y. 107, 71 N. E. 778.

The directors must exercise ordinary care and prudence—such degree of care as ordinarily prudent and diligent men would exercise; knowledge of all the affairs of a bank, or what its books and papers would show, can not be imputed to a director for the purpose of charging him with liability. *Mason v. Moore*, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

⁷² *Rankin v. Cooper*, 149 Fed. 1010.

⁷³ *Witters v. Sowles*, 31 Fed. 1.

⁷⁴ *Cockrill v. Abeles*, 30 C. C. A. 223, 86 Fed. 505.

⁷⁵ **Liability under state laws.**—The provisions of Laws 1879, c. 47, entitled "An act making officers of banking in-

stitutions responsible for the reception of deposits or the creation of debts, when such bank is insolvent, or in a failing condition," are not applicable to national banks and their officers. *Stout v. Lusk*, 9 Kan. App. 694, 59 Pac. 603.

Purd. Dig., p. 333, § 93, prohibiting bank cashiers from engaging in any other occupation, does not apply to cashiers of national banks. *Allen v. Carter*, 119 Pa. 192, 13 Atl. 70.

76. Liability at common law.—*Allen v. Luke*, 163 Fed. 1018; *Smalley v. McGraw*, 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915; *Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287, modified 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638.

The liability of directors of a national bank to a common-law action of deceit for false and fraudulent representations made by them in the pretended performance of duties imposed upon them by the national banking law is not precluded by the liability imposed in that law for violation of its provisions. *Prescott v. Haughey*, 65 Fed. 653.

them from liability to persons dealing with them.⁷⁷ Conversely, where the officer acts without the scope of his authority he is individually liable,⁷⁸ but the contrary is held.⁷⁹

Mismanagement.—A provision of the National Banking Act makes the directors liable for neglect or mismanagement whereby the bank's franchises and property are lost.⁸⁰ The act does not render them liable to a stockholder for neglect or mismanagement in the affairs of the bank whereby insolvency results, and the stock becomes worthless.⁸¹ A director is not expected to watch the routine of every day's business, but he should have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally know of and give direction to its important and general affairs.⁸² The mere fact that he does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability for losses sustained by the bank through the failure of the other directors to exercise proper care and supervision over its affairs.⁸³ While he ought not to be held responsible for the conduct of its business

77. Liability for acts in scope of authority.—The rule that payment to an agent acting within the scope of his authority is payment to the principal, and that the principal thereby becomes responsible for the default of his agent, applied in case of a payment to a cashier of a national bank; and therefore the person paying the money can not sue the cashier for a misappropriation of the money. *Wilson v. Rogers*, 1 Wyo. 51.

A corporation is such a legal entity that a stockholder may maintain an action against it, either at law or in chancery. Accordingly, in case of misappropriation of a stockholder's funds by a national bank, his remedy is against the bank, and not against the directors in their private capacity. *Wilson v. First Nat. Bank*, 1 Wyo. 108.

Since there is no implied warranty by an agent that his principal has authority to contract, an officer or agent of a national bank, acting within the scope of his authority, can not be held personally liable upon a contract of guaranty made on behalf of the bank, but which is in excess of the power of the bank to make. *Thilmany v. Iowa Paper-Bag Co.*, 108 Iowa 357, 79 N. W. 261, 75 Am. St. Rep. 259.

78. Liability for acts without scope of authority.—Defendant wrote on a letter head of a national bank, of which he was cashier, requesting plaintiff to sign a replevin bond for a third person, who had brought suit in plaintiff's county, and that they would indemnify

plaintiff from all harm, defendant adding the word "Cashier," after his signature to the letter. Held, that as the bank could not enter into such agreement, and as the letter did not clearly show that defendant was acting for the bank, with no intention of binding himself, he would be liable. *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

79. Where the president of a bank certified a noncommercial instrument for the accommodation of the drawers solely in his official capacity and ultra vires the bank's powers, he was not individually liable on such certification. *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782.

Where a bank director was not acting as a director in obtaining discount of certain notes belonging to his father by the bank, he can not be held liable because he induced or permitted the bank to extend credit to his father in excess of the legal limit fixed by the national banking law (Rev. St. U. S., § 5200 [U. S. Comp. St. 1901, p. 3494]). *Hicks v. Steel*, 142 Mich. 292, 105 N. W. 767, 4 L. R. A. N. S., 279.

80. Mismanagement.—*Witters v. Sowles*, 31 Fed. 1; *Robinson v. Hall*, 12 C. C. A. 674, 63 Fed. 222, reversing 59 Fed. 648; *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572; *Conway v. Halsey*, 44 N. J. L. 462.

81. *Conway v. Halsey*, 44 N. J. L. 462.

82. *Rankin v. Cooper*, 149 Fed. 1010.

83. *Rankin v. Cooper*, 149 Fed. 1010.

from the very day of his election, if he has not been a director before, he becomes responsible for acts or omissions from the time he acquires knowledge of the bank's condition and begins to actively participate in its affairs.⁸⁴

Increasing Capital Stock.—The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by the directors, with an understanding that they were not to be paid, is in violation of the Revised Statutes, and the directors of the bank participating are liable for all losses resulting to the creditors.⁸⁵

Declaring Dividends.—Bank directors can not be held personally liable for money paid out for dividends to a greater amount than net profits after deducting losses and bad debts, because there were debts bad in fact, but supposed to be good, when the dividends were declared and paid.⁸⁶

Conversion of Funds.—When a loss has been caused to a national bank by the appropriation of its funds to a purpose unauthorized by law, or by culpable negligence or conversion of its funds, the officers who participated in or consented to the act are jointly and severally liable for the entire amount.⁸⁷ To constitute a misapplication of the funds of a bank, it is necessary that some portion thereof shall be withdrawn from its possession or control, or that some conversion be made, so as to deprive the bank of the benefit thereof. Mere renewal of notes already in the bank's possession does not, of itself, constitute a misapplication of funds.⁸⁸

Making False Report.—A national bank is required to report five times a year its financial condition to the comptroller of the currency, and publish the reports in a newspaper.⁸⁹ While such reports are for the in-

84. Rankin v. Cooper, 149 Fed. 1010.

85. Rev. Stat., § 5142; Cockrill v. Ables, 30 C. C. A. 223, 86 Fed. 505.

86. Witters v. Sowles, 31 Fed. 1.

87. **Conversion of funds.**—Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; McKinnon v. Morse, 177 Fed. 576.

88. Mohrenstecher v. Westervelt, 30 C. C. A. 584, 87 Fed. 157.

89. **Liability for making false report.**—Rev. St., § 5211.

Liability to purchaser of stock.—The officer is liable to a purchaser of stock of the bank relying on the report. Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

Under Rev. St. U. S., § 5239 [U. S. Comp. St. 1901, p. 3515], providing that if the directors of a national bank knowingly violate, or permit an officer to violate, a provision of the title relating to national banks, they shall be liable for damages sustained by any person in consequence of such violation, they having attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources, assets which they had been informed

by the comptroller were doubtful, and for the collection or removal from the bank of which immediate steps should be taken they are liable to one who on the strength of the report bought stock of the bank for the depreciation thereof by reason of the shrinkage in value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. Taylor v. Thomas, 195 N. Y. 590, 89 N. E. 1113, affirming judgment 108 N. Y. S. 454, 124 App. Div. 53 which modified and affirmed in 55 Misc. Rep. 411, 106 N. Y. S. 538.

Liability to receiver.—Negligence of directors in permitting a false statement of the condition of a national bank to be published is a wrong to any person misled thereby into purchasing stock of the bank; and such directors are liable to respond to such person for the injury done, and the right of action therefor could not pass to the receiver of the bank on its insolvency. Houston v. Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

Certify report absolutely true.—The directors of a national bank, by "at-

formation of the comptroller and stockholders and depositors, they are also for the information of those who contemplate dealing with the bank; and, where a person is misled by false report to part with his money on the security of stock in an insolvent bank, he may recover his loss in an action for deceit against the officers of the bank who signed the false report.⁹⁰ Directors of a national bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank are not civilly liable to anyone deceived to his injury by such report. It is not true that, despite the exercise of diligence by the directors, if he attested an untrue report he is civilly liable because he did so at his risk, since it is his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute, is obvious, but is clearly also established by previous decisions of this court, pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional.⁹¹ The

testing" the reports of its condition, made by its executive officers to the comptroller of the currency, as required by Rev. St. U. S. § 5211, thereby certify that the statements in the report are absolutely true. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

Officer who did not sign.—Rev. St. U. S., § 5211, requiring reports of a national bank to be made to the comptroller of the currency, verified by the oath of the president or cashier, and attested by the signature of at least three of the directors, does not make a director individually liable for a false report, unless he attested it, or in some manner participated in making or publishing it. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

Negligence of officer.—Where directors of a national bank by their gross negligence permit fraudulent statements of the condition of their bank to be published, they are liable to a person misled and injured thereby, although they did not participate in the fraud. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

Where directors, in signing a statutory report, knew, or by the exercise of ordinary diligence should have known, that an item of "Loan and Discounts" contained paper worth much less than its face value, which would materially affect the value of the bank stock, they were individually liable, under the common law, to a purchaser of the stock who was damaged by in good faith relying on the report. *Smalley*

v. McGraw, 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915.

Bank not liable to stranger.—The directors of a national bank made reports and issued a statement falsely representing the bank to be in good condition. Held, that the bank could not thereby be made liable for deceit to a stranger, who, in reliance upon such reports and statement, had loaned money on the stock of the bank. *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 932.

90. Merchants' Nat. Bank v. Thoms, 11 O. Dec. 632, 28 Wkly. L. Bull. 164; *Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287; modified in 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638, and *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015, 27 S. Ct. 646.

91. Knowledge of falsity.—*Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638; *Smalley v. McGraw*, 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915; *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; *Mason v. Moore*, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

Considering the text of the national bank act, as now embodied in the Revised Statutes, including § 5239, the latter section affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638.

"And general consideration as to the

officers subject themselves to a common-law liability.⁹² It is no defense to such directors that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors and released them from all liability arising from such violations of duty, unless it is further shown that in some way the injured persons had elected to proceed against the bank.⁹³ But where the directors of a bank send to other banks a circular letter as to its condition, such letter being intended to induce other banks to deal with it by making deposits therein and by making it their agent, such directors will not be liable in an action of deceit to one of the recipients of such circular letter who, in reliance thereon lends money to a stockholder of the bank in the behalf of which the letter is written, although such letter be false and fraudulent, there being no privity in such case between the plaintiff and defendants in regard to the subject matter of the action; especially where the money was loaned prior to the receipt of the letter.⁹⁴ Concealment, by the directors, of the bank's embarrassment, is no breach of duty, unless the embarrassment is such as to demand immediate suspension.⁹⁵

Making Excessive Loans.—Directors of a national bank, who make or assent to the making of a loan to any one person of a sum exceeding one-tenth of the capital stock of the bank, become personally and individually liable for all loss sustained thereby;⁹⁶ but where the borrower, in such a

spirit and intent of the national bank act, *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502, also render necessary the conclusion that the measure of responsibility, concerning the violation by directors of express commands of the National Bank Act, is in the nature of things exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638.

Overruled case.—A director of an insolvent national bank, who has attested a report by the executive officers of the bank as to its condition, under Rev. St., § 5211, is personally liable for the false statements in such report, where relied on by a purchaser of stock in the bank, even though the director was unaware of the falsity of the reports, and had no intention to defraud. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

92. Common-law liability.—*Smalley v. McGraw*, 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915.

93. *Barnes v. Pogue*, 11 O. Dec. 798, 29 Wkly. L. Bull. 382.

94. *Merchants' Nat. Bank v. Thoms*, 1 O. Dec. 226, 31 Wkly. L. Bull. 137.

95. Concealment of insolvency.—*Robinson v. Hall*, 59 Fed. 648.

96. Liability for excessive loan.—Rev. St., § 5200; *Witters v. Sowles*, 31 Fed. 1; *Stephens v. Overstolz*, 43 Fed. 771.

Where the directors of a national bank assent to a loan in excess of the limit prescribed by Rev. St., § 5200, and subsequently retire paper representing a part of this loan, by charging it against an illegal dividend, declared when the bad paper reckoned to make up an apparent surplus more than exceeds the capital stock, the transaction is invalid, and for the amount of the paper thus retired the directors are personally liable, as provided by § 5239, for damages sustained in consequence of excessive loans. *Witters v. Sowles*, 43 Fed. 405.

Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They failed to record mortgages given to secure large debts due the bank, after they were aware of its insolvency, and erroneously advised an examiner who

case, is also one of the directors, he is not so liable, but simply as a debtor to the bank.⁹⁷

Making Hazardous Loan.—The directors of a bank may render themselves liable for making or consenting to hazardous loans.⁹⁸ But the directors of an insolvent national bank can not be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and, as they thought at the time, for the best interests of the bank, merely because such loans and discounts appear to have been unwise and hazardous when looked back upon.⁹⁹ They can not be held liable for inattention to duty as directors in not preventing a hazardous, imprudent, and disastrous loan, if such loan was made by their associates, without their knowledge, connivance, or participation.¹

Failure to Make Examination.—It is incumbent upon the directors of a national bank in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency.²

Acts Done before Organization.—Where a national bank executed a lease before the comptroller of currency had authorized it to do business, the directors and stockholders are not liable thereon where they are not

had taken charge of the bank that it was not necessary to record them. Held, that the directors were personally liable for the losses caused by such neglect, and the fraud and defalcations of the cashier. *Robinson v. Hall*, 12 C. C. A. 674, 63 Fed. 222, reversing 59 Fed. 648; distinguishing *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

Where the directors of a national bank became aware, through the report of a committee of their number, and also by notices sent them individually by the comptroller of the currency, that the bank had been making excessive loans to its president and to other persons, firms, and corporations with which he was associated, but took no effective steps to reduce such loans, or to prevent their increase, which continued until the bank became insolvent, they will be held jointly and severally liable for all losses which the bank sustained through subsequent transactions and which could have been prevented by a proper discharge of their duties. *Rankin v. Cooper*, 149 Fed. 1010.

97. *Witters v. Sowles*, 31 Fed. 1.

98. **Liability for hazardous loans.**—Where a bank director makes a wrongful loan of money from which loss occurs, it is no defense to an action by the receiver of the bank against the director's estate that the insolvency of

the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver. *Stephens v. Overstolz*, 43 Fed. 465.

A loss resulting to a national bank from bad loans, which were not repaid, can not be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by Rev. St., § 5191 (U. S. Comp. St. 1901, p. 3486). *Allen v. Luke*, 163 Fed. 1018.

Where a national bank presently solvent sold out a former stockholder's shares for his failure to pay an assessment thereon, made necessary by the negligence or misconduct of its directors in loaning its funds to irresponsible parties, such stockholder may maintain a suit on behalf of himself and of others similarly situated against the bank and its directors, who permitted or caused the loss, to compel such directors to account to and pay him the value of his stock as it stood before the acts of negligence or misconduct occurred. *Hanna v. People's Nat. Bank*, 35 Misc. Rep. 517, 71 N. Y. S. 1076; S. C., 76 App. Div. 224, 78 N. Y. S. 516, modified in *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

99. *Witters v. Sowles*, 31 Fed. 1.

1. *Witters v. Sowles*, 31 Fed. 1.

2. *Rankin v. Cooper*, 149 Fed. 1010.

named as parties, and there are no words to bind them to its covenants.³

Liability for Acts of Others.—The Revised Statutes provide that if the directors of any national banking association shall knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of National Bank Act every director who participated in or assented to the same, shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.⁴ This is a statutory standard of liability.⁵ The statute applies only to directors who participated in or assented to such violations.⁶ A director is not an insurer

3. Acts done before organization.—Judgment, *McCormick v. Seeberger*, 73 Ill. App. 87, affirmed in *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340.

4. Liability for acts of others.—Rev. St., § 5239; *Merchants' Nat. Bank v. Thoms*, 1 O. Dec. 226, 31 Wkly. L. Bull. 137.

5. *Mason v. Moore*, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

6. Persons participating in or assenting to.—*Witters v. Sowles*, 31 Fed. 1; *Mason v. Moore*, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

If a director did not participate in or assent to such violation, this statute fixes no individual or personal liability against him. *Mason v. Moore*, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

Speculation with bank's funds.—Where directors of a national bank engaged in or knowingly permitted stock speculation by the president and vice president with the bank's funds, such directors were liable for the losses sustained. *McKinnon v. Morse*, 177 Fed. 576.

Acts of examining committee known to directors.—Directors of a national bank are only required to exercise a reasonable supervision over its affairs; and where they appoint from their number a discount committee and an examination committee they shift the responsibility to such committees, and when during three years such committees permit the cashier of the bank to discount notes for a mere dealer in cheap musical instruments, taken by him from parties not shown to be responsible, which notes are frequently protested or renewed to such an extent that his discounts finally cover two-thirds of the bank's capital, the directors forming such committees are guilty of such negligence and misconduct as would render them liable to

stockholders injured thereby. *Hanna v. People's Nat. Bank*, 35 Misc. Rep. 517, 71 N. Y. S. 1076; S. C., 76 App. Div. 224, 78 N. Y. S. 516. Modified *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

Acts of examining committee unknown to directors.—The cashier of a national bank permitted an outside corporation, in which he was interested, to become indebted to the bank, through overdrafts and notes of its members, discounted to the amount of \$72,000, which was the chief cause of the bank's failure. The directors had an examining committee, and a committee on discounts, whose duty it was to examine the bank's condition and securities periodically. In fact, the committees made no independent examination, but merely checked the notes by a list furnished by the cashier. One of such lists, which was approved some months before the failure, showed eight notes for \$5,000 each; but although the capital of the bank was but \$50,000, the members of the committee to whom the list was furnished had no recollection of having seen such notes, nor did they know of the large indebtedness of the corporation. Held, that the members of the committees were guilty of negligence which rendered them liable for the losses resulting from the mismanagement of the cashier, but that the other directors were not liable; it not appearing that they had knowledge of the negligent manner in which the committees, on whose reports they relied, had performed their duties. Decree 82 Fed. 181, reversed. *Warner v. Penoyer*, 33 C. C. A. 222, 91 Fed. 587, 44 L. R. A. 761.

Acts of irresponsible person.—The directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individ-

of the fidelity of the bank's agents whom he has appointed, and is not responsible for losses resulting from the wrongful act or omission of the other directors or agents,⁷ unless the loss is a consequence of his own neglect of duty.⁸

uals and firms largely in excess of the amounts allowed by law. The directors are personally liable for the losses caused by such negligence, and the fraud and defalcations of the cashier. *Robinson v. Hall*, 12 C. C. A. 674, 63 Fed. 222, reversing 59 Fed. 648.

Acts of person reputed to be trustworthy.—The directors of a national bank which has become insolvent by reason of losses caused by the discount, from time to time, of paper not properly secured, indorsed by a director who is a man of wealth, and the largest stockholder in the bank, and in whom the other directors have reason to place confidence, can not be held liable for the mere failure to discover the illegal transactions, and to prevent such director from continuing therein. *Movius v. Lee*, 30 Fed. 298, affirmed in 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

Directors of a national bank are not guilty of negligence for failure to examine the books where the cashier, who is universally believed to be honest and capable, has the entire management of the affairs of the bank, which appears to be in a prosperous condition, and there are no grounds of suspicion known to the directors. *Warner v. Penoyer*, 33 C. C. A. 222, 91 Fed. 587, 44 L. R. A. 761, reversing 82 Fed. 181.

Directors unfamiliar with business.—A national bank having been organized, the promoter took 380 shares of stock in his own name, and procured the defendants to be directors, as well as a person to be elected cashier by them. The directors were not acquainted with the banking business. The proposed cashier was known to the directors, at least by reputation, and was supposed by them to be competent and trustworthy, and of considerable experience in the business, and they had full confidence in his integrity and ability to take charge of the bank. The cashier acted as manager of the loan and discount business of the bank, and the directors merely as advisers, when applied to. The promoter of the bank knew, and the other stockholders were presumed to know, that the directors were wholly unused to the banking business. Held,

that the directors were not liable for the acts of the cashier in violation of the banking law, done without their participation or knowledge. *Clews v. Bardon*, 36 Fed. 617.

7 Not insurer.—Directors of a national bank are not insurers or guarantors of the fidelity and proper conduct of its executive officers, and are not responsible for losses resulting from the wrongful acts or omissions of such officers, provided they have exercised ordinary care in the exercise of their own duties as directors. *Rankin v. Cooper*, 149 Fed. 1010.

8. Where directors negligent.—*Rankin v. Cooper*, 149 Fed. 1010.

A receiver of national bank may sue the directors for malfeasance of officers when they were so negligent as to make practically no examination of its affairs, and to hold meetings only at rare intervals, and then to limit their business to the election of directors and the declaration of dividends. *Gibbons v. Anderson*, 80 Fed. 345.

Where caution would not have prevented loss.—It is the duty of the directors of a national banking association to exercise a general supervision and control over its affairs, and they are required, in the performance of such duty, to act in good faith, with ordinary diligence and intelligence, the measure of the care required being a question of fact, under the particular circumstances of each case. While they can not divest themselves of such duty of general supervision by committing it to the cashier, they may properly intrust him with all discretionary powers which appertain to the immediate management of the business, including the discounting of paper; and they are not liable for losses occurring through his malversations, unless their own proper care would have prevented such losses. Nor are they required to take measures of unusual precaution, when they have no reason to distrust the integrity or efficiency of the cashier or other employees. *Decree*, 82 Fed. 181, reversed. *Warner v. Penoyer*, 33 C. C. A. 222, 91 Fed. 587, 44 L. R. A. 761.

Failure to take bond.—In *Robinson v. Hall*, 12 C. C. A. 674, 63 Fed. 222,

§ 254. — Actions to Enforce Liability.—Statutory Remedy Exclusive.—The Revised Statutes prescribing the method of enforcing the liability of the directors of national banks for violation of the banking law, are exclusive of other remedies.⁹

Prerequisites to Action.—A national bank may maintain a suit against its officers to enforce their liability for losses resulting from a violation of the statutory requirements in conducting the business of the bank. A suit by the comptroller for dissolution of the association and an adjudication of such violations is not a condition precedent to the enforcement of such liability.¹⁰ The directors of a bank having been negligent in the management of its affairs, resulting in loss, and one of them being appointed its receiver, his refusal to bring action therefor is not a prerequisite for action by the stockholders on behalf of the bank.¹¹

Jurisdiction.—The state courts have jurisdiction of an action brought against the officers of a national bank to recover damages on account of

reversing 59 Fed. (U. S.) 648, the directors were held liable for loss sustained through irresponsible cashier of whom they required no bond.

9. Actions to enforce liability.—Rev. St., §§ 5234, 5239; National Exch. Bank *v. Peters*, 44 Fed. 13.

The remedy against directors of a national bank provided by Rev. St., § 5239, for violations of the National Banking Act, is exclusive, and their liability for declaring and paying dividends out of the capital stock of the bank can be enforced only by the receiver acting under the direction of the comptroller, after the violation of the statute has been judicially determined, and a forfeiture declared. *Hayden v. Thompson*, 67 Fed. 273, reversed in 17 C. C. A. 592, 71 Fed. 60.

10. Prerequisites to action.—Rev. St., § 5239; *National Bank v. Wade*, 84 Fed. 10; *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638; *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015, 27 S. Ct. 646; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, reversing 23 Hun 237.

The forfeiture of the bank's charter in a suit brought by the comptroller of the currency is not a condition precedent to the maintenance of a suit against its directors, under Rev. St., §§ 5200, 5239, for excessive loans. *Cockrill v. Cooper*, 29 C. C. A. 529, 86 Fed. 7.

A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the miscon-

duct or negligence of defendants, and it is not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller. *Allen v. Luke*, 141 Fed. 694.

The right to maintain an action under Rev. St., § 5239, to recover of a bank director the damages sustained by his bank in consequence of excessive loans made by him while serving in the capacity of director, is not affected by the fact that the comptroller has or has not procured a forfeiture of the bank's charter. *Stephens v. Overstolz*, 43 Fed. 771.

Decision contra.—Under Rev. St., § 5239, providing that, if the directors of a national bank shall violate any of the provisions of the title relating to the organization and management of banks, the franchises of the bank shall be forfeited, such violation, however, to be determined by a proper court of the United States in a suit therefor by the comptroller, and that in cases of such violation every director participating therein shall be personally liable for all damages which the bank, its shareholders, or any other person shall have sustained in consequence thereof, the comptroller can not authorize the receiver to bring suit, under § 5234, to enforce such personal liability, until it has been adjudged by a proper court that such acts have been done as authorize a forfeiture of the charter. *Welles v. Graves*, 41 Fed. 459.

11. Flynn v. Third Nat. Bank, 122 Mich. 642, 81 N. W. 572.

alleged violations of the National Bank Act by such officers.¹²

Election of Remedies.—In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank.¹³

Remedy at Law or in Equity.—The liability of an officer for violation of his duty to the bank is in most cases cognizable in equity;¹⁴ but, where

12. Jurisdiction.—Ex parte Chetwood, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, reversing 23 Hun 237; *Barnes v. Swift*, 3 N. P. 291, 3 O. Dec. 688.

It does not follow from the provision of § 5239, Rev. Stat., conferring exclusive jurisdiction on courts of the United States to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors, that such action could only be brought in the courts of the United States after a forfeiture has been adjudged. *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638, followed in *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015, 27 S. Ct. 646.

State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by Rev. St. U. S., § 5239 [U. S. Comp. St. 1901, p. 3515], which provides for the forfeiture of the charter of a national bank as the result of violations of the National Bank Act by the directors, such violations to be determined only by the federal courts, and makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof. *Yates v. Jones Nat. Bank*, 71 Neb. 734, 105 N. W. 287; *Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638.

13. *Barnes v. Pogue*, 11 O. Dec. 798, 29 Wkly. L. Bull. 382.

14. Remedy in equity.—*Rankin v. Cooper*, 149 Fed. 1010; *Boyd v. Schneider*, 65 C. C. A. 209, 131 Fed. 223; *Ackerman v. Halsry*, 37 N. J. Eq. 356; *Hand v. Atlantic Nat. Bank*, 9 Abb. N. C. 287, 55 How. Prac. 231.

The personal liability of directors of a national bank for violation of Rev. St., § 5204, by declaring dividends in

excess of net profits, and of § 5200, for loaning to separate persons, firms, or corporations amounts exceeding one-tenth of the capital stock, can not be enforced in an action at law. *Welles v. Graves*, 41 Fed. 459.

Suit by stockholders and others.—Equity has jurisdiction of a suit by a stockholder of a national bank, in behalf of himself and other stockholders, against the bank, its receiver and directors, to recover of the latter damages to the stock of plaintiff and other uniting stockholders, caused by their negligence. *Sayles v. White*, 18 App. Div. 590, 46 N. Y. S. 194.

Where accounting necessary.—Where a stockholder's agent of a national bank sought to recover from directors losses sustained by stock speculations of the president and vice president with the directors' knowledge and participation, a bill in equity for an accounting was sustainable, though a recovery at law could be had as to some of the transactions pleaded. *McKinnon v. Morse*, 177 Fed. 576.

A suit by the receiver of an insolvent national bank against its officers and directors to compel restitution of funds unlawfully diverted by them is one to execute a trust, and involves an accounting as to trust funds, and hence is of equitable cognizance. *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582.

Where securities to be converted into money.—A suit by a national bank against its former officers and directors, under Rev. St., § 5239, to recover for losses resulting from their mismanagement in violation of the provisions of the national banking law, is cognizable in equity, and the conversion of securities into money is required before the extent of the liability can be ascertained, and when, therefore, the remedy at law is not complete or adequate. *National Bank v. Wade*, 84 Fed. 10.

there is an adequate remedy at law, equity has no jurisdiction.¹⁵

Form of Action.—The right of action against the directors of a national bank, for violation of the provisions of the National Banking Act, is for a tort, and comes within the common-law definition of actions on the case.¹⁶

Parties to Actions—Bank.—Damages to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, recoverable only in an action by the bank or for the benefit of all the stockholders and creditors.¹⁷

Same—Receiver.—A receiver of an insolvent national bank in his own name or in the name of the bank, may enforce against the directors, for the benefit of the stockholders, depositors, and other creditors of the bank, any right or claim resting upon the nonperformance or negligent performance of their duties that the bank itself could have enforced.¹⁸ An action against the directors of a national bank under the provisions of Rev. St., § 5239, can be maintained only by a receiver of the bank.¹⁹

Same—Stockholder.—A stockholder may sue, in equity, the directors for their gross negligence, resulting in loss of the corporate assets, where the directors are still in control or the receiver has refused to sue.²⁰ But

15. Remedy at law.—*McKinnon v. Morse*, 177 Fed. 576.

An action by a receiver of a bank whose charter has been forfeited against a director is properly brought at law; there being no necessity for invoking the aid of a court of chancery either because of the nature of the issues involved, or to avoid a multiplicity of actions. *Stephens v. Overstolz*, 43 Fed. 771.

Recovery of payment.—An allegation that a director withdrew a specific sum from the bank, after knowledge of its insolvency, and immediately before its suspension, states a matter for an action at law, and is not cognizable in equity. *Robinson v. Hall*, 59 Fed. 648.

16. Form of action.—*Cockrill v. Butler*, 78 Fed. 679.

An action by a private individual against the directors for damages arising from the making of false reports or other violations of The National Banking Act can only be maintained as an action at the common law in the nature of an action of deceit. *Gerner v. Thompson*, 74 Fed. 125.

17. Parties plaintiff.—*Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287; modified in 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638; *Yates v. Utica Bank*, 206 U. S. 181, 51 L. Ed. 1015, 27 S. Ct. 646.

18. Receiver.—*Movius v. Lee*, 30 Fed. 298.

A receiver of an insolvent national bank has a right to maintain a suit in his own name against directors to charge them for losses that may have been sustained by the corporation and its creditors through their wrongful or fraudulent acts. *Cockrill v. Abeles*, 30 C. C. A. 223, 86 Fed. 505.

19. Gerner v. Thompson, 74 Fed. 125; *Howe v. Barney*, 45 Fed. 668.

20. Stockholder.—*Ackerman v. Halsey*, 37 N. J. Eq. 356; *Hand v. Atlantic Nat. Bank* (N. Y.), 9 Abb. N. C. 287, 55 How. Prac. 231.

A stockholder may maintain an action against the directors charged by him to have caused loss by their negligence; the bank and its receiver having refused to bring suit. *Nelson v. Burrows* (N. Y.), 9 Abb. N. C. 280.

A stockholder in a national bank can not sue the directors for their gross negligence, whereby loss of the corporate assets has resulted. *Conway v. Halsey*, 44 N. J. L. 462.

Where bank refuses to sue.—Where the directors of a national bank have violated the provisions of The National Banking Act, to the damage of the bank and its shareholders, and the bank fails on request to bring an action against such directors for the recovery of such damages, an action may be maintained for that purpose by a shareholder. *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct.

a shareholder can not maintain an action against the directors for such violation for his benefit alone, while the bank is a going concern and has not been dissolved by proper action by the comptroller of the currency in a federal court, but the action must be brought by him on behalf of the others, and the bank must be made a party.²¹ One who has been a shareholder, but has parted with his stock, cannot maintain an action against the directors for such violation before the dissolution of the bank by proper proceedings in the federal court.²²

Depositor.—Where several depositors of a national bank had claims against a number of the bank's directors, arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, such depositors were entitled to maintain a single suit against such directors in equity.²³

385; *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

By one stockholder on behalf of all.—If the receiver of a national bank is one of the directors chargeable with neglect, one or more of the stockholders may maintain an action in behalf of all for misuse of the bank's funds. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

A stockholder of an insolvent national bank may bring a suit in a state court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the comptroller of the currency have all refused to bring such a suit. *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

After appointment of receiver.—A stockholder in an insolvent national bank for which a receiver has been appointed can not sue its directors to make them personally liable for the mismanagement of the bank, as the right of action is in the receiver, and not in the individual stockholder. *Howe v. Barney*, 45 Fed. 668.

Receiver directed to sue by comptroller.—Where no proceeding is pending under the national bank law for forfeiture of the charter of a bank, its stockholders may, in a state court, maintain an action against its directors to recover for their gross neglect without alleging that the comptroller of the currency directed, or refused to direct, the receiver to bring such ac-

tion. *Brinckerhoff v. Bostwick*, 88 N. Y. 52, reversing 23 Hun 237.

Stockholder's shares sold to pay assessments.—Where a bank sold a stockholder's shares for his failure to pay assessments made necessary by losses occasioned by the negligence of the directors, an action to recover the loss so sustained, which would ordinarily be brought against the delinquent directors by the corporation, need not be brought by it, but may be brought by the stockholders affected when the managing directors at the time are the ones charged with the misconduct. *Hanna v. People's Nat. Bank*, 35 Misc. Rep. 517, 71 N. Y. S. 1076; S. C., 76 App. Div. 224, 78 N. Y. S. 516. Modified in *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778.

21. *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

22. **Stockholder who has sold shares.**—*Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

23. **Depositor.**—The National Bank Act, providing for the administration of the affairs of an insolvent national bank by a receiver appointed by the comptroller of the currency, does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. *Boyd v. Schneider*, 65 C. C. A. 209, 131 Fed. 223.

Creditors.—A creditor of an insolvent bank, for which a receiver has been appointed, cannot sue its directors for the purpose of making them personally liable for the mismanagement of the bank.²⁴

Person Relying on False Report.—An action may be maintained by a person relying to his injury thereon against the directors for making a false report of the bank's condition.²⁵

Defendants.—To an action by one stockholder on behalf of all others, the bank itself, and the receiver, as such, are proper and necessary parties defendant.²⁶

Limitation of Actions.—Where a national bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, a court of equity will entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state.²⁷

Pleadings.—In an action by a stockholder of a national bank, charging the directors with misconduct, a complaint failing to allege a demand upon the comptroller of the currency for, and his refusal of, a direction that the receiver bring the action, is defective.²⁸ It is not necessary that the bill allege the exact amount of the loss arising from each transaction set out where it is not yet known; but it should set out with particularity the acts of defendants relied on to constitute negligence or misconduct, and the details of the several transactions should be given with such fullness as can

24. Creditor.—National Exch. Bank v. Peters, 44 Fed. 13.

The right to maintain a suit against the directors of an insolvent national bank under Rev. St., § 5239 [U. S. Comp. St. 1901, p. 3515], to recover for general distribution, as assets of the bank, sums alleged to have been lost to it through the negligence or mismanagement of its affairs by defendants, is one vested in the receiver for the benefit of both creditors and stockholders; and conceding that such suit may be maintained without a previous adjudication forfeiting the bank's charter under said section, and even that it may be brought by others than the receiver, acting under direction of the comptroller of the currency (which is doubtful), it can not in any case be maintained by creditors alone, who have no interest in the fund sought to be recovered, beyond the amount of their claims, and no authority to represent the stockholders to whom the remaining interest belongs. *Boyd v. Schneider*, 124 Fed. 239.

25. *Gerner v. Thompson*, 74 Fed. 125.

26. Parties defendant.—*Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

In an action by a stockholder of a national bank against the directors for loss of the corporate assets through the latter's negligence, the bank and the receiver appointed by the comptroller should be joined. *Hand v. Atlantic Nat. Bank*, 9 Abb. N. C. 287, 55 How. Prac. 231.

A receiver of the assets of a national bank, appointed by the comptroller of the currency, is a necessary party defendant in a suit in equity against directors of the corporation to recover damages for the waste and loss of the corporate assets, caused by the negligence of the directors in the discharge of their official duties. *Hand v. Atlantic Nat. Bank*, 9 Abb. N. C. 287, 55 How. Prac. 231.

27. *Rankin v. Cooper*, 149 Fed. 1010.

28. Pleadings.—*Brinckerhoff v. Bostwick*, 23 Hun 237, reversed in 88 N. Y. 52.

be done by complainant.²⁹ An allegation that the directors permitted loans to be made to one person in excess of ten per centum of the bank's capital is not equivalent to an averment that they knowingly permitted them, or that they could have ascertained the existence thereof by an examination of the books, and is insufficient to charge them with personal liability for resulting losses.³⁰ The plaintiff may state the aggregate amount of the excessive loans made to each party, and the damage resulting therefrom in each case, accompanying each allegation with an exhibit showing the dates and amounts of the several loans that go to make up the aggregate sum stated in the petition, and is not compelled to declare in a separate count for each loan made.³¹ Where several depositors of an insolvent national bank filed a bill against directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect.³² An allegation that the plaintiff was elected as the stockholder's agent to wind up the affairs of the bank to the place of a receiver, gave bond and is the duly qualified agent, sufficiently shows his capacity to sue.³³

Issues.—In an action by a national bank to recover damages sustained in consequence of excessive loans made by former directors, the issues to the jury are whether the loans were made when the borrower was already indebted to one-tenth of the capital actually paid in by the bank, whether such loans were knowingly made by such directors, and what portions of the moneys were so lost.³⁴

Evidence.—In an action by the receiver of an insolvent national bank, to charge the directors with liability for losses, proof of general supineness and looseness of management on their part is not sufficient to cast upon them the burden of exonerating themselves, as the court can only charge them with liability for losses shown to have resulted from their negligence.³⁵ A bill by the receiver of a national bank against its officers and directors for the unlawful diversion of funds of the bank is sufficient to support a recovery, when the diversion is proved, although a further allegation that such diver-

29. *Allen v. Luke*, 141 Fed. 694.

In such a bill, charging the making of illegal loans by defendants as directors, it is not necessary to allege a formal vote of defendants authorizing or approving such loans. *Allen v. Luke*, 163 Fed. 1018.

30. *Robinson v. Hall*, 59 Fed. 648.

31. *Stephens v. Overstolz*, 43 Fed. 771.

32. *Boyd v. Schneider*, 65 C. C. A. 209, 131 Fed. 223.

33. **Allegation of agent's right to sue.**—A bill by a stockholder's agent of an insolvent bank against directors to recover moneys lost by ultra vires transactions of the president and vice

president, in which defendants participated, alleging that at a stockholders' meeting held pursuant to law plaintiff was elected as shareholders' agent to wind up the affairs of the bank in place of a receiver, and that he gave bond, as required by law, and is the duly qualified agent of the shareholders to act in the place of the receiver, sufficiently showed complainant's capacity to sue. *McKinnon v. Morse*, 177 Fed. 576.

34. *City Nat. Bank v. Crow*, 27 Okl. 107, 111 Pac. 210.

35. Decree, 82 Fed. 181, reversed in *Warner v. Penoyer*, 33 C. C. A. 222, 91 Fed. 587, 44 L. R. A. 761.

sion was fraudulent is not proved. The gravamen of the bill is the fact of unlawful diversion.³⁶

Presumptions.—The president and cashier of a national bank, who personally conduct its business, are not presumed ignorant of the falsity of reports of the bank's condition, published by them; the books of the bank showing the falsity on their face.³⁷

§ 255. Criminal Responsibility of Officers or of Persons Aiding or Abetting Them—§ 256. — Offenses—§ 256 (1) Making False Entries or Reports—§ 256 (1a) In General.—Every president, director, cashier, teller, clerk, or agent of any association, who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.³⁸ The statute is highly penal, and should therefore receive a strict construction.³⁹ The offense is punishable by imprisonment not less than five nor more than ten years, and is therefore an infamous crime.⁴⁰ Where the president of a national bank made a false report to the comptroller of the currency with intent to deceive an examiner who might be appointed to make an examination of the bank, such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in this section.⁴¹

Report of Association.—In an indictment for making a false entry in a report, it is not necessary to allege that the report in which the false entry was made was one made by the association, since the penalty is affixed to any person making the false entry, and not to the association or its officers for making a false report.⁴²

Knowledge and Intent.—The false entry or report must have been made knowingly,⁴³ with the intent, either to injure or defraud the bank, or some

36. *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582.

37. *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

38. **Making false entries or reports.**—Rev. Stats., § 5209, 5 Fed. Stats. 145.

Under this section, it is an indictable offense to make a false entry in a report to the comptroller of the currency, or to aid and abet the making of such entry. *United States v. French*, 57 Fed. 382.

As to officers generally, see ante, "Criminal Responsibility," § 60.

39. *United States v. Ege*, 49 Fed. 852.

40. **Punishment as felony.**—*Folsom v. United States*, 160 U. S. 121, 40 L.

Ed. 363, 16 S. Ct. 222. See, also, *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

41. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

42. *Harper v. United States*, 7 Ind. T. 437, 104 S. W. 673.

43. **Made knowingly.**—*Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943; *United States v. Allen*, 47 Fed. 696; *United States v. Wilson*, 176 Fed. 806; *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 539; *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394; *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *Graves v. United States*, 165 U. S. 323, 41 L. Ed. 732, 17 S. Ct. 393.

other corporation, or some firm or person; to deceive some officer of the bank; or to deceive some agent appointed or thereafter to be appointed to examine the affairs of the bank. If any one of these intents is present, the offense is complete.⁴⁴ A false entry in a report by a national bank officer or director is not an incorrect entry made through inadvertence or negligence, but is an entry known to the maker to be untrue.⁴⁵ Mere arbitrary exercise of discretion in keeping the books, not amounting to an abuse thereof, is insufficient to constitute the offense.⁴⁶ This intent may be inferred from the false entry itself. The law presumes that a man intends the legitimate consequences of his acts, and, if the natural and probable consequence of a false entry in a report or a book of the bank to deceive the examiner, or to injure or defraud the bank, or to deceive any of its officers, the jury is authorized to presume, from the entry itself, that it was made with that intent. It is no defense to a wrongful act, knowingly and intentionally committed, that it was done with an innocent intent.⁴⁷ The jury was warranted in find-

44. Intent to injure or deceive.—United States *v.* Allis, 73 Fed. 165.

"It is sufficient that he made a false entry knowingly, with the intent to deceive an agent that was appointed or that was thereafter to be appointed to examine its affairs, though he did not intend to injure or defraud the bank or to deceive its officers. It is sufficient that he made the false entry knowingly, with the intent to injure or defraud the bank, though he did not intend to deceive the examiner, or all the officers of the bank. It is sufficient that he knowingly made the false entry with the intent to deceive an officer of the bank, though he did not intend to injure or defraud the bank or to deceive the examiner." United States *v.* Allis, 73 Fed. 165.

Intent to deceive creditors.—Where an indictment under Rev. St., § 5209, alleges the making of false entries in a report of a national bank to the comptroller of the currency with intent to injure and defraud the banking association and the stockholders thereof, and to deceive its directors, it is not sufficient to prove an intent to deceive other persons, such as creditors, depositors, the comptroller, or the public. United States *v.* Allen, 47 Fed. 696.

45. Made negligently or inadvertently.—United States *v.* Graves, 53 Fed. 634; United States *v.* Allen, 47 Fed. 696; United States *v.* Allis, 73 Fed. 165.

"Certainly the jury could not have convicted if they had found that the entry had been omitted through any inadvertence or negligence, or in ig-

norance of its untrue character." Cochran *v.* United States, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

A simple mistake by an officer of a national bank in making an entry in one of the company's books, growing out of a clerical error, is not a violation of Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), punishing the making of false entries by a bank officer with intent to deceive. United States *v.* Wilson, 176 Fed. 806.

46. United States *v.* Allen, 47 Fed. 696.

47. Presumed for commission of act.—United States *v.* Allis, 73 Fed. 165.

The court advised the jury that in determining defendant's intent they might consider testimony tending to show that defendant, without notice to the board of directors, and without their knowledge or consent, had invested one-half the bank's capital in the bonds in question, and then said: "The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with

ing that false entries were made with guilty intent from the testimony of defendant that the said entries were made under his direction, with the knowledge that they were not transactions of the day on which they were entered in the books of the bank.⁴⁸ In determining the intent the jury should consider the testimony of the defendant.⁴⁹ The gravamen of the offense of making a false entry by the president of a national banking association, in the books thereof, is the false entry with intent to injure, defraud, or deceive.⁵⁰ Intent to injure a bank by a false report to the comptroller of the currency is not negatived as matter of law by the fact that the report showed the bank to be in better condition than it really was.⁵¹ Intention to deceive any one director or officer is as criminal as the intention to deceive all of them.⁵² The fact that the officers in question were not actually deceived is not conclusive proof of the absence of intent to deceive.⁵³

Officer Deceived.—An indictment which charges the making of a false entry in a report with intent to deceive the comptroller of the currency, can not be sustained, as he is not an agent appointed to examine the affairs of a national bank.⁵⁴ A conviction can not be had where it appears that the officers alleged to have been deceived were accomplices in the speculation, to hide which the false entries were made.⁵⁵

Falsity Apparent.—It is immaterial that the act was not done in a skillful manner, or that the falsity could be easily detected by inquiry or by examination of other books.⁵⁶

Forgery Not Involved.—The making, by an officer or agent of a national banking association, of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to

which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive," etc. Held, to be no error. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

If such false entries had a natural tendency to deceive the bank officers, the fact that defendants deny having had any such actual intent can not rebut the presumption of intent arising from the nature of the entries themselves. *United States v. Means*, 42 Fed. 599.

48. *United States v. Folsom*, 7 N. Mex. 532, 38 Pac. 70.

49. *United States v. Allis*, 73 Fed. 165.

50. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91, 15 S. Ct. 36; *Graves v. United States*, 165 U. S. 323, 41 L. Ed. 732, 17 S. Ct. 393; *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

51. *United States v. Corbett*, 215 U. S. 233, 54 L. Ed. 173, 30 S. Ct. 81.

52. *United States v. Means*, 42 Fed. 599.

53. *United States v. Means*, 42 Fed. 599.

54. **Officer deceived.**—*United States v. Bartow*, 10 Fed. 874, 20 Blatchf. 349.

55. *United States v. Means*, 42 Fed. 599.

56. **Falsity apparent.**—*United States v. Harper*, 33 Fed. 471.

"If the false entry is calculated to deceive, the making of it in the books of the association, with intent to deceive, is all that is necessary to bring the act within the meaning of the statute. It is perfectly apparent that any false entry in any account book of a bank used in transacting its banking business is calculated to deceive. The fact that its falsity may be exposed by an examination of other books of account, does not render it any the less a false entry made with intent to deceive. The circumstance that the attempt to deceive by making a false entry was not an adroit and skillful one, does not relieve the act of its criminal character." *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

deceive its officers or any agent appointed to examine its affairs, does not necessarily involve the crime of forgery.⁵⁷

Request by Comptroller.—To constitute the offense of making a false report of the condition of a national bank, it is not necessary that such report, when made by an officer of the bank to the comptroller, should have been made in response to a call or request of the comptroller.⁵⁸

Conspiracy to Make False Entry.—A conspiracy to cause false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit an offense against the United States, within the meaning of § 5440 of the Revised Statutes and is indictable thereunder.⁵⁹

§ 256 (1b) What Amounts to False Entry or Report.—The crime of making false entries by an officer of a national bank, with intent to defraud, includes any entry on the books of the bank intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or defraud the association.⁶⁰ A false entry is an entry made in the bank's books by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association.⁶¹ An entry which represents, as an actual transaction, one which does not exist, or which is false in a material part, constitutes a false entry within the statute.⁶² By entry is meant an item in an account.⁶³

Actual Transaction.—The making of a false entry is a concrete offense which is not committed where the transactions entered actually took place, and is entered exactly as it occurred.⁶⁴ Entries in the books of a national

57. *Cross v. North Carolina*, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.

58. *Bacon v. United States*, 38 C. C. A. 37, 97 Fed. 35.

59. *Scott v. United States*, 64 C. C. A. 631, 130 Fed. 429.

60. *United States v. Harper*, 33 Fed. 471.

61. *United States v. Wilson*, 176 Fed. 806.

62. *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

63. **Entry means item in account.**—The word "entry," as used in Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), declaring that every officer, clerk, or agent of a national banking association who makes any false entries in any of the bank's books with intent to injure or defraud the association shall be guilty of a misdemeanor, means "an item in an account." *United States v. Morse*, 161 Fed. 429.

64. **Entry of actual transaction.**—*Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394. See, also, *Coffin v. United States*, 162 U. S. 664,

40 L. Ed. 1109, 16 S. Ct. 943; *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235; *Graves v. United States*, 165 U. S. 323, 41 L. Ed. 732, 17 S. Ct. 393.

The court did not err in giving the following instruction on behalf of the government in the trial of a national bank president. "The crime of making false entries by an officer of a national bank with the intent to defraud, defined in the Revised Statutes of the United States § 5209, includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association. The crime may be committed personally or by direction." The exception was confined to the foregoing, but the instruction thus continued: "Therefore the entry of a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slip is false, the entry of it in

bank which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries and will not sustain an indictment for the making of false entries.⁶⁵ If an overdraft on a national bank is properly made and allowed, or even if improperly allowed, the entry of the transaction on the books of the bank just as it occurred is not a false entry.⁶⁶ But the fact that entries in a report made by a national bank to the comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank.⁶⁷ In a prosecution of an officer of a national bank for making false entries in its books with intent to deceive the bank examiner, where there was testimony as to certain deposits made which were marked as special, and that the identical money was a few days later returned to the depositors, an instruction was correct which charged the jury that, if they found beyond a reasonable doubt that the understanding between such depositors and the defendant was that the money was only to be used by the bank for the purpose of being shown to the examiner as a part of the funds of the bank, then the entry of such sums as deposits was a false entry.⁶⁸ Officers of a national bank may not make a false entry in the bank's books

the bank and the books of the bank is false." Or in refusing to give the following instructions asked by defendant: "The making of a false entry is a concrete offense which is not committed where the transaction entered actually took place and is entered exactly as it occurred." "The truthful entry of a transaction charged as fraudulent does not constitute a false entry within the meaning of the statute." The instruction as given was correct and in accordance with rule indicated in *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394; *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

And where the charges asked were in some respects unsound, yet the exception reserved to the charge actually given by the court was well taken, because therein the question of misapplication and of false entries are interblended in such a way that it is difficult to understand exactly what was intended. The language used must have tended to confuse the jury and leave upon their minds the impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted "a false entry;" in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction

which it represented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

65. *Twining v. United States*, 72 C. C. A. 529, 141 Fed. 41; *Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904; *United States v. Young*, 128 Fed. 111.

66. *Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904.

67. *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 539.

Where an indictment against bank officers alleged a conspiracy to make false entries in the books of the bank, one of which was charged to consist in entering in "call loans account," a "fictitious" promissory note as though it were a bona fide note affected by certain stock as collateral, whereas in truth the bank unlawfully owned the stock and the note was created and entered as a genuine note merely to conceal the illegality of the original purchase of the stock and the continued holding thereof, was not defective, in that the entry was a true entry of a fraudulent transaction only. *United States v. Morse*, 161 Fed. 429.

68. *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127.

with intent to deceive and escape criminal liability because they go through the idle and deceitful form of making a transaction to which the entry might nominally but not really relate.⁶⁹

Check as Cash.—The entry on the books of a national bank by the cashier as a cash item of a check which actually entered into a transaction of the bank will not support an indictment of the cashier, for making a false entry, although it is further charged that he knew the check to be worthless and fraudulent, and made the entry with intent to deceive. The entry, being a truthful statement of the actual transaction, can not be converted into a false entry by any other fraudulent or unlawful act of the cashier.⁷⁰

Overdraft as Loan.—The entry of an overdraft as a loan or discount is a false entry.⁷¹

Purchase of Stock as Loan.—Entries in the books of a national bank showing loans to persons named on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which they gave without any intention of paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents.⁷²

Suspended Loan as Loan.—It is not making a false entry, within the meaning of the statute, to enter in such report, under heading of "Loans and Discounts," items which, on books of the bank, and for convenience of its officers, have been temporarily withdrawn from that heading, and which are,

69. *Billingsley v. United States*, 101 C. C. A. 465, 178 Fed. 653.

70. *United States v. Young*, 128 Fed. 111.

71. **Overdraft as loan.**—Where the account of a depositor with a national bank shows that he has drawn out more money than has been credited to him, the excess constitutes an overdraft, and is required to be so reported in the bank's statement to the comptroller. The fact that the depositor has given the bank a note to secure overdrafts, where it has not actually been discounted, and the proceeds placed to his credit on the books, does not warrant the reporting of such overdraft under the head of "loans and discounts." *Bacon v. United States*, 38 C. C. A. 37, 97 Fed. 35.

Where the form of report as prescribed by the comptroller contains a heading of "Loans and Discounts," and also one of "Overdrafts," a bank officer is not justified in entering overdrafts which are being carried as such

on the books of the bank as "Loans and Discounts," merely because he regards an overdraft as a temporary indefinite loan, nor because these two headings are both found among the "Resources" of the bank. *United States v. Graves*, 53 Fed. 634.

Every overdraft, whether made by previous arrangement or not, whether secured or not, and whether drawing interest or not, is a loan, and is required by the law and the rules prescribed by the comptroller to be listed and reported as an overdraft. It is, therefore, no defense, to a charge of false entries in respect to overdrafts, that they had been arranged for or secured, or that interest was to be paid upon them by agreement, if such false entries were made with a criminal intent; but, in determining the intent, the jury may consider the testimony of defendant that he considered the overdrafts as loans. *United States v. Allis*, 73 Fed. 165.

72. *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 539.

from day to day, carried on books of the bank under heading of "Suspended Loans," while awaiting the action of the directors as to entering them up as a loss on profit and loss account.⁷³

Bond as Loan.—In determining whether the entry, under heading of "Loans and Discounts" in such report, of certain corporation bonds secured by mortgage, and owned by the bank, was the making of a "false entry," within the meaning of the statute, the jury may consider the fact that on the prescribed form of report, after hearing of "U. S. Bonds," there is a heading of "Other Stocks, Bonds," etc., and that, in the report made, certain other corporation bonds, owned by the bank, were entered under the latter heading.⁷⁴

Accommodation Note as Loan.—The entry of an accommodation note given the officers of the bank to take up overdrafts by them as a loan is not a false entry.⁷⁵

Fraudulent as Bona Fide Asset.—If the officer of a bank procured a note to be given to it by an irresponsible person, with intent of apparently increasing the bank's assets, and thereafter made an entry in a report required by law to the comptroller of the currency, including such note as a bona fide asset of the bank, with either of the intents denounced by the statute, such entry would be a false entry within such section.⁷⁶

Liabilities.—The liabilities of a national bank, which are required to be stated in the reports to the comptroller of the currency, include contingent as well as absolute liabilities; and hence an unmatured note, payment of which at maturity is guaranteed by the bank, should be included in the list of liabilities.⁷⁷

Making Alteration.—The erasure of figures constituting part of a number already written in an account book of a national bank, and the writing of different figures in place of those erased, constitute making an entry.⁷⁸

Entry on Deposit Slip.—Where a transaction by a national bank officer with intent to defraud is entered on a deposit slip, entry of the contents of

73. *United States v. Graves*, 53 Fed. 634.

74. *United States v. Graves*, 53 Fed. 634.

75. **Accommodation note as loan.**—A national bank, of which defendant was cashier, was in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the overdraft to be made good, and the officers induced F., who was solvent, to execute his note to the bank for their accommodation, and this was discounted; the proceeds being credited

to the officers' individual accounts. Held, that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the comptroller of the currency as a loan and discount of the bank did not constitute the making of a "false entry," in violation of Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497). *Hayes v. United States*, 94 C. C. A. 449, 169 Fed. 101.

76. *Hayes v. United States*, 94 C. C. A. 449, 169 Fed. 101.

77. *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

78. *United States v. Crecilius*, 34 Fed. 30.

such slip upon the books of the bank by him, or by his direction, is making a false entry.⁷⁹

Schedule on Back of Report.—A schedule on the back of a report where it is covered by the same affidavit as the rest of the report is a part of the report.⁸⁰

Forgery of Note.—The forgery of a note, payable at a national bank, for the purpose of deceiving the national bank examiner, does not come within Rev. St., § 5418, which makes it penal to forge any instrument with intent to defraud the United States, or to present a forged instrument at the office of an officer of the United States with such intent.⁸¹

Entries Omitted.—The only method by which a national bank can reduce its stock being that prescribed in Rev. St., § 5143, and the possibility of ownership of its own stock being recognized by § 5201, the lawful ownership of its own shares by a national bank does not constitute a pro tanto reduction of its corporate stock, and hence is improperly omitted from the bank's statement of assets.⁸² The fact that a national bank is prohibited from purchasing its own stock,⁸³ does not make such a purchase a nullity, nor does the purchase extinguish the stock, and, where a bank bought and held shares of its own stock, an entry in a report to the comptroller of the bonds, securities, etc., held by the bank from which such stock was omitted, constituted a false entry.⁸⁴

What Is a Report.—It is not a necessary ingredient of the offense of making a false entry in a report, that the report shall be one of those mentioned in §§ 5211, 5212, or one which the bank is bound by law to make. It is sufficient if the report is one made in the due course of business.⁸⁵

§ 256 (1c) By Whom Entry Made.—The crime of making a false entry in a report may be committed by any officer or agent of a bank who actually makes or directs the entry,⁸⁶ whether he makes the report or not.⁸⁷ The directors of a national bank are officers.⁸⁸ The comptroller of the currency is an agent within this section.⁸⁹

79. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

80. *Harper v. United States*, 7 Ind. T. 437, 104 S. W. 673.

81. *Cross v. North Carolina*, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.

82. *United States v. Morse*, 161 Fed. 429.

83. Rev. St., § 5201.

84. *Morse v. United States*, 98 C. A. 321, 174 Fed. 539.

85. *United States v. Booker*, 80 Fed. 376.

86. **By whom made.**—*Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

87. The objection, that no one except he who verifies the reports can be convicted under said indictments, is unsound as matter of law, for the

reason above stated, that the penalty is affixed to the making of the false entry, and not at all to the making of the report. While the officers of the bank who verify and attest the reports are doubtless responsible for what is contained in them; if, as matter of fact, and as often happens, the entries in such reports are actually made by other agents of the association, it does not diminish the criminality of such agents in the eye of the law, that the reports are ostensibly those of the president and cashier. *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

88. *United States v. Means*, 42 Fed. 599.

89. **Comptroller is agent.**—The comptroller of the currency is an

In Person or by Another.—The making of false entries in the books of a national bank is equally an offense, whether it is done by the bank officer charged, or whether he procures it to be done through the medium of others.⁹⁰ The making of false entries by a clerk in the bank, by direction of the defendant, constitutes the defendant a principal in the offense of making false entries.⁹¹ The president of a national bank can not be convicted, of the crime of making false entries in reports made by such bank to the comptroller upon evidence that he signed and verified reports containing false entries, where it is also shown that such entries were not made by him, or by his direction.⁹²

In Pursuance of Duty.—The statute includes a report voluntarily made as well as one required by law, if the false entry is made with the requisite unlawful intent.⁹³ The assistant cashier of the bank is indictable for mak-

agent within the provisions of Rev. St. U. S., § 5209 (U. S. Comp. St. 1901, p. 3497), that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that Rev. St., § 5240 (U. S. Comp. St. 1901, p. 3516), confers power upon him to appoint suitable agents to examine the affairs of such banks. Judgment, 162 Fed. 687, reversed. *United States v. Corbett*, 215 U. S. 233, 54 L. Ed. 173, 30 S. Ct. 81.

90. In person or by another.—*Richardson v. United States*, 104 C. C. A. 69, 181 Fed. 1; *United States v. Harper*, 33 Fed. 471; *United States v. Allen*, 47 Fed. 696.

The offense of making a false entry in the books of a national bank by an officer, may be made personally or by direction to another. *United States v. Wilson*, 176 Fed. 806.

"A false entry made in the books or reports of the bank by a clerk, bookkeeper, or other subordinate employee or officer, by the command or direction of the president of the bank, is a false entry made by the president, and he is liable to punishment for it under this statute, if he gives the direction, knowing the entry to be false, and with the intent explained to you." *United States v. Allis*, 73 Fed. 165.

91. In re Van Campen, Fed. Cas. No. 16,835, 2 Ben. 419.

Upon a charge against an officer of a national bank of making false entries in the books of the bank, it is immaterial whether defendant made the entries in person or caused them to be made by a clerk or bookkeeper.

Morse v. United States, 98 C. C. A. 321, 174 Fed. 539.

Defendant, who was vice president of a national bank, caused stock of the bank to be purchased through brokers. The shares as bought were delivered to the bank and paid for by a cashier's check. On the same date defendant would cause his stenographer to give her unsecured note to the bank for a like amount. No loan was in fact made to her, but the stock was bought by the bank and retained by it, although the transactions did not so appear on the books, and when reports were made to the comptroller the stock was not shown therein. Held, that although the reports were made by employees from the books, and the false entries in respect to the bank's securities therein were not expressly directed by defendant, he was chargeable therewith criminally under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497). *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 539.

92. United States v. Booker, 98 Fed. 291.

But it has been held that in an indictment of a national bank president under Rev. St., § 5209, for making false entries in a report to the comptroller of the currency, it is no defense that such entries were made by a clerk, and verified by the president without actual knowledge of their truth, since it was his duty to inform himself; and especially is this the case as regards items showing assets and liabilities. *United States v. Allen*, 47 Fed. 696.

93. In pursuance of duty.—Judgment, 7 Ind. T. 437, 104 S. W. 673, reversed. *Harper v. United States*, 95 C. C. A. 555, 170 Fed. 385.

ing a false entry in a report to the comptroller, although he is not one of the officers authorized to make such a report; for he may be regarded as within the category of a clerk or agent.⁹⁴ But it has been held that the defendant can not be convicted for making a false entry where it is not his duty to make such entry.⁹⁵

Principals and Accessories.—Where a violation of the statute is committed by an officer and an outsider, the one must be prosecuted as a principal, and the other as an aider and abetter;⁹⁶ but the provision as to aiding and abetting does not apply to those who, as national bank officers, with fraudulent intent, make or cause to be made false entries in the books and reports of the bank, as such they are principals, whether they bring about the falsification through the medium of others, innocent or guilty, or do it themselves; the aiding and abetting applying only to those not connected with the bank, who counsel, or incite those who are.⁹⁷

§ 256 (2) Wrongfully Certified Check.—Every president, director, cashier, teller, clerk, or agent of any association, who, without authority from the directors, issues or puts in circulation any of the notes of the association; or without such authority, issue or puts forth any certificate of deposit, draws any order or bills of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; with intent to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.⁹⁸

94. *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

95. An indictment charging the directors with making false entries in a report to the comptroller of the currency on the condition of the bank can not be sustained under § 5209 for under § 5211 their sole duty in regard to such reports is to attest them by their signatures; and any entries therein by them would be mere spoliation, and not "false," within the meaning of the section. *United States v. Potter*, 56 Fed. 83.

False entries in a statement, made by the defendant, a bookkeeper, at the request of the bank examiner, purporting to give the balances due depositors, which statement it was the duty of the examiner to make, and not of the bookkeeper, will not sustain an indictment for making "false entries in * * * a statement of the associa-

tion," under Rev. St., § 5209. *United States v. Ege*, 49 Fed. 852.

96. *Richardson v. United States*, 104 C. C. A. 69, 181 Fed. 1.

97. *Richardson v. United States*, 104 C. C. A. 69, 181 Fed. 1.

The president and assistant cashier of a national bank are indictable as principals, under Rev. St., § 5209, for making a false entry in a report, although neither of them actually signed or attested the report. *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

98. **Wrongfully certifying check.**—Rev. Stats., § 5209, 5 Fed. Stats. 145.

Revised Statutes § 5208.—Rev. St., § 5208 (U. S. Comp. St. 1901, p. 3497), declares that it shall be unlawful for any officer, agent, or clerk of any national bank to certify any check when the drawer has not on deposit with the bank an amount of money equal to the

Knowledge and Intent.—To constitute a “wilful” violation of the statute, within the criminal provision, a wrongful intent is essential,⁹⁹ and an officer of a national bank who certified a check drawn thereon, believing in good faith that the drawer had a sufficient deposit in the bank, and having reasonable grounds for such belief, could not be convicted thereunder, though in fact the drawer’s account was at the time overdrawn.¹ The necessary criminal intent may be inferred from the act done with knowledge of the facts.²

What Amounts to Violation of Statute.—An officer of a national bank is not liable if he had general authority from the directors to draw bills of exchange, if the bills relate to the business of the bank; but such authority is no justification where the notes relate to the private business of the

amount specified in the check; and Act Cong. July 12, 1882, c. 290, § 13, 22 Stat. 166 (U. S. Comp. St. 1901, p. 3497), declares that any officer, clerk, or agent of a national bank who shall certify checks before the amount thereof shall have been regularly entered to the credit of the drawer on the books of the bank shall be guilty of a misdemeanor. Held, that § 5208 does not create any criminal offense, but that such section should be read with § 13, and that the two create one offense, viz, the certification of a check when the drawer has not sufficient money to cover it, or before the amount shall have been regularly entered. *United States v. Heinze*, 161 Fed. 425.

An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. *United States v. Heinze*, 161 Fed. 425.

99. Knowledge and intent.—In order to convict a national bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation, in order to avoid knowledge. *Spurr v. United States*, 31 C. C. A. 202, 87 Fed. 701, reversed in 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

“The word ‘wilful’ is omitted from the description of offenses in the latter part of this section. Its presence in the first can not be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of

the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law.” *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812; *Potter v. United States*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

Where the defense was that defendant had no actual knowledge that there were not sufficient funds in the bank to meet the cheques, nor knowledge of facts putting him on inquiry; that, on the contrary, he believed that drawers had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance before he certified; that he honestly relied on that information, and that he had the right to do so, defendant was entitled to the full benefit of this defense, and in order to that, it was vital that the meaning of “willful violation,” as used in § 13 of the Act of 1882, should be clearly explained to the jury. *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

1. Judgment, 31 C. C. A. 202, 87 Fed. 701, reversed. *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

2. Inferred from act done.—On the trial of an indictment charging defendant with conspiring with officers of a national bank for the certification of checks by such officers when the drawer had no funds on deposit, in violation of Rev. St., § 5208 [U. S. Comp. St. 1901, p. 3497], it is not essential to conviction to prove that defendant had knowledge that such false certification was in violation of the statute; the necessary criminal intent being imputed where it is shown that

officer.³ The certifying officer need not himself deliver the check to some one outside of the bank, or have any part in such delivery, to constitute the crime.⁴

Agreement as to Overdraft.—On an indictment under Rev. St., § 5208, for illegally certifying a check while an officer of a bank, and under § 13 of the Act of 1882, imposing a penalty upon one "who shall willingly violate," etc., the above section, defendant can show a positive agreement on the part of the officer of the bank that the overdraft caused by such certified check should be practically treated as a loan from day to day, secured by ample collateral, and that before such certified check issued there was deposited in advance an ample amount of cash.⁵

Conspiracy.—While it is a settled rule of criminal law that an indictment for conspiracy will not lie where a plurality of agents is logically necessary to complete the crime which it was the object of the conspiracy to commit, such rule does not apply to an indictment under Rev. St., § 5440, for the conspiracy between the defendant, who had no official connection with a national bank, and an officer of such bank to violate Rev. St., § 5208 by causing a check of defendant drawn on the bank to be certified by such officer when defendant did not have a sufficient amount on deposit to pay the same.⁶

§ 256 (3) Misapplication, Abstraction, or Embezzlement of Funds
—§ 256 (3a) In General.—The Revised Statutes provide that every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association, with intent to injure or defraud the association or any other company, body politic or corporate, or individual person, or to deceive

the parties to the transaction acted with knowledge of the facts. *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225.

3. *United States v. Johnson*, Fed. Cas. No. 15,483.

4. **Delivery of check.**—"The word 'certify' as commonly understood implies that the cheque, upon which the words of certification have been written, has passed from the custody of the bank and into the hands of some other party, and when the charge is that the defendant, 'did unlawfully, knowingly and willfully certify a certain cheque,' the import of that accusation is not simply that he wrote certain words on the face of the cheque, but that he did it in such a manner as to create an obligation of the bank; in such a way as to make an instrument which can properly be called a certified cheque. And the subsequent recital, 'by then and there writing, placing, and putting in and upon and across the face of said

cheque the words and figures following,' etc., is not to be taken as absolutely limiting the import of the word 'certified' to the mere act of so writing, placing, etc., but as simply descriptive of the form of the certification—of that which he personally did. It was not necessary, to constitute the offense, that he should himself deliver the cheque to some third party outside the bank, or even that he should take any part in such delivery. His offense would be complete, if, after he had written the words of certification as stated, with the intent that they should be used to create a contract on the part of the bank, the actual delivery had been made by some clerk or other officer of the bank without his actual knowledge." *Potter v. United States*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

5. *Potter v. United States*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

6. *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225.

any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.⁷ The statute provides for the three distinct offenses of misapplication, abstraction and embezzlement.⁸

Misapplication.—Wilful misapplication of the moneys, funds, or credits of a national bank consists in their misapplication by an officer, clerk, or agent of the bank, made wilfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime.⁹

Abstraction.—Abstraction, is the act of one who, being an officer, clerk, or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished.¹⁰

7. **Misapplication, etc., of funds.**—Rev. Stats., § 5209, 5 Fed. Stats. 145.

8. *United States v. Lee*, 12 Fed. 816.

9. **Misapplication.**—*United States v. Breese*, 131 Fed. 915, reversed in *Breese v. United States*, 74 C. C. A. 388, 143 Fed. 250, on another point.

10. **Abstraction.**—*United States v. Breese*, 131 Fed. 915, reversed in *Breese v. United States*, 74 C. C. A. 388, 143 Fed. 250, on another point. See, also, *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

"It is true that the word 'abstract,' as used in this statute, is not a word of settled technical meaning like the word 'embezzle' as used in statutes defining the offense of embezzlement, and the words 'steal, take, and carry away,' as used to define the offense of larceny at common law. It is a word, however, of simple, popular meaning, without ambiguity. It means to take or withdraw from, so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. This, of course, does not embrace every element of that which under this section of the statute is made the offense of criminally abstracting the funds of the bank. To constitute that offense, within the

meaning of the act, it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs. All these elements are contained in the description of the offense in the count in question; the count is, therefore, sufficient within the decisions of this court upon similar statutes. *United States v. Mills* (U. S.), 7 Pet. 138, 8 L. Ed. 636; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512." *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

"Unlike the word 'misapply,' as used in the same section, the word 'abstract' is not ambiguous, because it does not appear from other parts of the statute that there are two or more kinds of abstracting, both unlawful, but only one described as a criminal offense. The word 'abstract,' as used in the statute, therefore, has but one meaning, being that which is attached to it in its ordinary and popular use. It is to be accepted with that meaning in framing an indictment under the

Embezzlement.—The crime of embezzlement from a national bank by an officer, clerk, or agent involves two general elements: First, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association of others. The crime of embezzlement necessarily includes the offenses of abstraction and willful misappropriation, but either of the latter offenses may be committed without embezzlement.¹¹

Officer, Agent, etc.—The statute applies to an agent in liquidation appointed by the stockholders.¹²

Moneys, Funds or Credits.—The word "moneys" refers to the currency or circulating medium of the country,¹³ the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made, and the word

section, which is not required, in order to be sufficient, to contain more than those allegations which are necessary, when added to the allegation of abstracting, to complete the description of the offense intended by the statute." *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

11. Embezzlement.—*United States v. Breese*, 131 Fed. 915, reversed in *Breese v. United States*, 74 C. C. A. 388, 143 Fed. 250, on another point.

"Embezzle," as used in Rev. St., § 5209, in relation to officers and agents of national banks, describes a crime which a person has opportunity to commit by reason of some office or employment, and which is some breach of confidence or trust. *United States v. Conant*, Fed. Cas. No. 14,844, 9 Rep. 36.

Embezzlement is the unlawful conversion by an officer to his own use of funds intrusted to him, with intent to injure or defraud the bank; and that abstraction and misapplication are conversions of funds of the bank not especially intrusted to his care, with like intent. *United States v. Youtsey*, 91 Fed. 864, reversed on the merits in *Youtsey v. United States*, 97 Fed. 937, 38 C. C. A. 562.

12. Officer, agent, etc.—Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed in *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

The fact that the officers of a national banking association which has gone into liquidation occupy the relation of trustees for creditors does not preclude the president of the association, who has been appointed as agent by the shareholders, to assist in the liquidation, from being prosecuted under Rev. St., § 5209, for willfully misapplying the assets of the association. Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed. *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

The misapplication of the assets of a national bank, in process of liquidation, by an agent appointed to close its affairs, is an offense within the provisions of Rev. St., § 5209, making it a crime for any officer or agent of such association to willfully misapply its assets. Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed. *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

13. Moneys, funds or credits.—*United States v. Smith*, 152 Fed. 542.

The word "moneys," as used in Rev. St., § 5209, providing the punishment of embezzlement by any clerk, officer, or agent of a national bank, includes the bills of national banking associations, as well as the coin and legal tender notes of the United States. *United States v. Johnson*, Fed. Cas. No. 15,483.

"credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it.¹⁴

Previous Possession.—To constitute embezzlement of the funds of a bank by its officer, it must appear that the funds embezzled came lawfully into the possession of defendant, and were, while so held by him, converted to his own use, with intent to defraud the bank.¹⁵ But such possession need not be exclusive. It is sufficient if the business or assets of the association were actually or practically intrusted to his care and management, so that by virtue of his office he had not merely access to, or a constructive holding of, such funds, but such actual possession, though concurrent with others, as enabled him to have and exercise a control over them that would place him in lawful possession.¹⁶ To constitute the crime of abstracting¹⁷ or of misapplying¹⁸ the funds of a national bank, no previous lawful possession of the funds by the defendant is necessary.

Intent to Injure or Defraud.—The intent to injure or defraud is made an element of the offenses of embezzlement, abstraction, or wilful misapplication of funds.¹⁹ The intent to injure or defraud does not mean malice or

14. *United States v. Smith*, 152 Fed. 542.

15. **Necessity for possession.**—*United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580; *United States v. Harper*, 33 Fed. 471.

16. *United States v. Harper*, 33 Fed. 471.

17. *United States v. Breese*, 131 Fed. 915, reversed in 74 C. C. A. 388, 143 Fed. 250, on another point; *United States v. Harper*, 33 Fed. 471.

18. "A willful and criminal misapplication of the funds of the association may be made by an officer or agent of the bank without having previously received them into his manual possession." *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580; *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934. See, also, *Claassen v. United States*, 142 U. S. 140, 35 L. Ed. 966, 12 S. Ct. 169.

If it be necessary to the commission of the offense of willfully misapplying the funds of the bank that they should have come previously into the possession of the defendant in his official capacity, so that he could be said to have been intrusted with their possession, all distinction between the offenses of willfully misapplying the funds and of embezzlement would disappear. But it is evidently the intention of the statute not to use the words "embezzle" and "willfully misapply" as synonymous. In order to misapply the funds of the bank it is not necessary that the

officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

19. **Intent to injure or defraud.**—*United States v. Breese*, 131 Fed. 915, reversed in *Breese v. United States*, 714 C. C. A. 388, 143 Fed. 250, on another point; *United States v. Harper*, 33 Fed. 471; *United States v. Steinman*, 172 Fed. 913; *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580; *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

Where, in a prosecution of the vice president of a bank for alleged misappropriation of the bank's funds in the payment of overdrafts by the bank's cashier, there was no evidence that the checks representing the overdrafts were paid with the knowledge or under the directions of the vice president, the offense as to him was not proved, under the rule that to constitute a willful misappropriation of a national bank's funds there must be an unlawful application by the person charged, with in-

ill-will,²⁰ but such intent as may be inferred from the wilfully and knowingly doing that which is illegal, and which, in its natural consequence, must injure another.²¹ It may be shown or conclusively presumed from the doing of the wrongful, fraudulent, or illegal act.²² It need not necessarily have been the object or purpose with which the act is done; but it is sufficient if the nature and necessary effect of the act is to injure or defraud the bank or others, and it is willfully and intentionally done.²³ If there was a

tent to injure and defraud the bank. *Prettyman v. United States*, 103 C. C. A. 384, 180 Fed. 30.

Applies to embezzlement as well as to false entries.—Under § 5209, Rev. Stat., of the United States, an intent to defraud the association, or other company or person, is an essential element of the crime in every case. The words "with intent in either case to injure or defraud," etc., apply as well to embezzlement, etc., of the funds, as to the making false entries in the books. *United States v. Voorhees*, 9 Fed. 143.

"It is necessary in an indictment under § 5209, Rev. Stat., charging willful misapplication of the funds of a banking association, to allege that such misapplication was with intent to defraud." *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

In fact, the gravamen of the offense consists in the evil design with which the misappropriation is made, and a count which should omit the words "willfully," etc., and "with intent to defraud," would be clearly bad. *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934; *Potter v. United States*, 155 U. S. 433, 39 L. Ed. 214, 15 S. Ct. 144; *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

20. There need not be malice or ill will.—*United States v. Harper*, 33 Fed. 471.

The offense of "abstracting" the funds of the bank under this section is not necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the *animus furandi*, the intent to deprive the owner of his property, but under § 5209 an officer of the bank may be guilty of "abstracting" the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent ap-

pointed to examine its affairs. This intent may exist in a case of abstracting without that intent which is necessary to constitute the offense of stealing. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

21. Act done knowingly.—*United States v. Harper*, 33 Fed. 471.

Where one is prosecuted for violation of a statute making an officer of a national bank guilty of embezzlement if he embezzles "with intent to injure or defraud the association," guilty intent is shown by proof that defendant knowingly applied the funds in a manner forbidden by statute; and the fact that other officers of the bank knew of the misappropriation, or that defendant did not intend to profit thereby, is immaterial. *United States v. Taintor*, Fed. Cas. No. 16,428, 11 Blatchf. 374.

If it appears that the funds of the banking association have been abstracted or willfully misapplied by defendant, he is precluded from denying that it was done with unlawful intent. *United States v. Lee*, 12 Fed. 816.

22. Inferred from illegal act.—*United States v. Harper*, 33 Fed. 471; *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

Upon a prosecution of a bank president for embezzlement under The National Bank Act (Act June 3, 1864, § 55) an intent to defraud the bank is to be inferred from the fact of embezzlement. In *re Van Campen*, Fed. Cas. No. 16,835, 2 Ben. 419.

A charge that if the defendant "either embezzled or willfully misapplied" the funds or credits of the bank, "whereby, as a necessary, natural, or legitimate consequence, its capital was reduced, or placed beyond the control of the directors, or its ability to meet its engagements or obligations, or to continue its business, was lessened or destroyed, the intent to injure or defraud the bank may be presumed," is correct. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

23. *United States v. Breese*, 131 Fed. 915, reversed in *Breese v. United States*,

fraudulent understanding between the defendant and the paying teller that checks drawn by the defendant in favor of a firm of stockbrokers were to be paid out of the funds of the bank, when the defendant had no funds or only insufficient funds to his credit, and that such debts were not to be charged in his account, but were to be fraudulently concealed until he should make deposits sufficient to meet them, defendant had a guilty intent to injure or defraud the bank.²⁴

Conversion to Use of Defendant.—To constitute a willful misapplication by an officer of a national bank of its funds, there must be a conversion by the officers to his own use or the use of some one other than the bank,²⁵ but the officer need not have himself received any of the funds or other advantage.²⁶ The conversion may have been for the benefit of the officer's children.²⁷ When one of the officers of a national bank willfully converted certain of the bank's funds to his own use, it is no defense that the money was subsequently refunded; such fact being only evidence to negative the officers' intent to defraud at the time of the alleged conveyance.²⁸

Injury to Bank.—An officer is not guilty of misapplication of the bank's funds where, by the transaction, the bank is not injured.²⁹

74 C. C. A. 388, 143 Fed. 250, on another point.

An intent to injure or defraud a national bank, within the meaning of Rev. St., § 5209, does not necessarily involve malice or ill-will towards the bank. It is sufficient that the unlawful intent is such as, if carried into execution, will necessarily or naturally injure or defraud the bank. *United States v. Kenney*, 90 Fed. 257.

24. *United States v. Kenney*, 90 Fed. 257.

25. **Conversion to use of bank.**—*United States v. Britton*, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525, reaffirming *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 589; *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394; *United States v. Harper*, 33 Fed. 471; *Adler v. United States*, 182 Fed. 464; *United States v. Breese*, 131 Fed. 915, reversed in 74 C. C. A. 388, 143 Fed. 250, on another point; *United States v. Morse*, 161 Fed. 429.

There must be a willful misapplication for the use or benefit of accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body corporate or natural person, being entirely different from acts constituting an official maladministration, subjecting the bank to a forfeiture of its charter, as pro-

vided by § 5239 (page 3515). *United States v. Steinman*, 172 Fed. 913.

26. It was the intention of congress to make criminal the misapplication and conversion of the funds of national banking associations without regard to whether or not the party so misapplying received any of the funds or other advantages, directly or indirectly. *United States v. Lee*, 12 Fed. 816.

To constitute willful and criminal misapplication of the funds of a national bank by its officers, under Rev. St., § 5209, the accused need not have been previously in actual possession of such funds by virtue of any trust, duty, or employment, nor have derived any personal benefit from the transaction. It is enough if the misapplication is made by him, or under his direction, for his benefit, or that of some one other than the association, with the intent to injure or defraud the association. *United States v. Harper*, 33 Fed. 471.

27. **For benefit of children.**—On the question of whether or not a bank president is guilty of abstracting or misapplying its moneys, it is immaterial that he drew out some of it for his children. *Breese v. United States*, 45 C. C. A. 535, 106 Fed. 680, judgment reversed on rehearing 48 C. C. A. 36, 108 Fed. 804.

28. **Money refunded.**—*United States v. Morse*, 161 Fed. 429.

29. **Injury to bank.**—*Agnew v. United*

Consent or Knowledge of Other Officers.—To constitute the crime of willfully abstracting or misapplying the funds of a national bank by its officer, it must appear that the funds were withdrawn by the accused without the knowledge or consent of the association.³⁰ The criminal character of the act is not affected by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto, by taking no action in regard to it.³¹ But it has been held that officers of a national bank possess no authority to produce or permit a conversion of the bank's funds to the use of one of such officers; authority to commit a crime being an impossibility.³² The acts and intent of the president of a bank in obtaining money from it on worthless securities, being such as to make him guilty of embezzlement, abstraction, or willful misapplication of its funds, it is immaterial that his acts were permitted, sanctioned, or ratified by the other officers of the bank, with knowledge of the facts.³³ Though the president of a bank, in appropriating and converting its funds to his own use, does it in such a way that it can be easily discovered, and he is liable to a civil action, and does not abscond, or otherwise avoid the civil suit, he may be convicted of embezzlement.³⁴

States, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

Accused, who was president of a national bank, having overdrawn his account \$18,303.80, executed his note to the bank for \$20,000, secured by certain corporate stock, the proceeds of the note being used to cancel the overdraft, and the balance was credited to his account, subject to check. The note not having been paid, the collateral was sold for \$5,000 cash, which paid the \$1,146 additional advancement and \$3,800 on the overdraft. Held, that the execution of the note was a benefit and not a loss to the bank, and that accused by that transaction was not guilty of misapplying the bank's funds, in violation of Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497). *Adler v. United States*, 182 Fed. 464.

30. Consent or knowledge of other officers.—*United States v. Harper*, 33 Fed. 471; *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916; *In re Van Campen*, Fed. Cas. No. 16,835, 2 Ben. 419.

Where an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, the use by the officer of the proceeds of the discount for his own purposes will not be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution, under § 5209, Rev.

St. *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank. *United States v. Breese*, 131 Fed. 915, reversed on another point in *Breese v. United States*, 74 C. C. A. 383, 143 Fed. 250.

31. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

32. *United States v. Morse*, 161 Fed. 429.

Consent to use in speculation.—On indictment of a bank cashier under Act June 3, 1864, § 55, for embezzling funds of a national bank, evidence that the funds were used in stock speculations with the consent of the officers of the bank, and for its benefit, is inadmissible to disprove the averments in the indictment that the acts were done with intent to injure and defraud the bank. *United States v. Taintor*, Fed. Cas. No. 16,428, 11 Blatchf. 374.

33. *Breese v. United States*, 45 C. C. A. 535, 106 Fed. 680, judgment reversed on rehearing 48 C. C. A. 36, 108 Fed. 804, on another point.

34. *Breese v. United States*, 45 C. C.

Exercise of Discretion.—A misapplication of the bank's funds by an officer in the honest exercise of his discretion does not subject him to punishment,³⁵ but an abuse of discretion in bad faith does.³⁶

Application of Common-Law or State Statute.—The fact that a person who has stolen property belonging to a national bank is an officer of the bank and subject to punishment for embezzlement does not relieve him from his liability to punishment for the same act as a larceny at common law or under the statutes of a state.³⁷ Where congress has prescribed the punishment only where an officer of a national bank embezzles property of the bank, a state legislature may prescribe the punishment where the property embezzled is deposited in the bank, and belongs to the depositor.³⁸

§ 256 (3b) Means of Commission of Offense.—It is not material by what means the abstraction is effected. It may be done by one act or series of acts, or by fraudulent schemes under the color of loans, discounts, checks, or entries.³⁹ Where a customer of a national banking association, whose note to the bank was about to mature, delivered a check to the bank to pay the note when due, the check coming into the hands of defendant as cashier of the bank, he cashed it and converted the proceeds, the loss was that of the bank, and defendant's offense a willful misapplication and abstraction of the bank's funds and credits, and not a mere breach of trust.⁴⁰

Payment of Overdraft.—The mere fact of payment by the officers of a national bank of a check which creates an overdraft does not necessarily

A. 535, 106 Fed. 680, judgment reversed on rehearing 48 C. C. A. 36, 108 Fed. 804, on another point.

35. Exercise of discretion.—United States v. Harper, 33 Fed. 471.

The misappropriation of the funds of a national bank by an officer in the honest exercise of official discretion, in good faith, without fraud, for the advantage, or supposed advantage, of the bank, is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith, for personal advantage, and with fraudulent intent, it is punishable. United States v. Fish, 24 Fed. 585.

Gross maladministration and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497). Prettyman v. United States, 103 C. C. A. 384, 180 Fed. 30.

36. Abuse of discretion.—A known abuse by an officer of discretionary power in making a series of loans which it is known the directors would not sanction, will constitute a criminal

misapplication of funds of the bank, if done in bad faith, for private gain, and not in the exercise of honest judgment. United States v. Fish, 24 Fed. 585.

37. Application of common law or state statute.—Commonwealth v. Barry, 116 Mass. 1.

38. Gen. St. tit. 12, § 191, prescribing the punishment where an officer of any bank incorporated by authority in the state embezzled any property deposited in the bank, applies to tellers of national banks doing business within the state. State v. Tuller, 34 Conn. 280.

39. Means used.—United States v. Harper, 33 Fed. 471; United States v. Breese, 131 Fed. 915, reversed in 74 C. C. A. 388, 143 Fed. 250, on another point.

So far as the question of guilt or innocence of an officer under the statute is concerned, there is no distinction between a loan in bad faith for the purpose of defrauding the bank, and an application of money with like intent in a form other than a loan. United States v. Fish, 24 Fed. 585.

40. Geiger v. United States, 89 C. C. A. 516, 162 Fed. 844.

constitute a fraudulent misapplication of the funds of the bank;⁴¹ but an officer of a national bank, who, with an intent to defraud the bank, allows a firm, of which he is a member, to overdraw its account, is guilty of a misapplication of the moneys of the bank.⁴²

Giving Credit.—To constitute the offense of willful misapplication of the funds of a national bank, it is not essential that the money should be actually withdrawn from the bank, but the offense may be consummated by giving fraudulent credits, and the transfer of the same in the usual way by means of checks.⁴³ But the funds must be withdrawn from the bank's control or possession or converted in some way, so as to deprive the bank of the benefit thereof.⁴⁴ For the president of a national bank to place among the

41. Payment of overdraft.—*Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904. See post, "Aiding or Abetting," § 256 (5).

The fact alone that an officer of a national bank causes it to pay overdrafts, drawn by himself or other customers of the bank, or makes a loan without security, does not constitute an offense, under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497); nor does an indictment averring such facts charge an offense, because it further avers an intent to injure and defraud the bank. *United States v. Norton*, 188 Fed. 256.

The fact that the president who was also a director, permitted a depositor, while indebted to the association, to withdraw his deposit, would not constitute a criminal misapplication by the defendant of the funds of the association under the provisions of § 5209, Rev. Stat. The count charges neither application nor misapplication by the defendant of the funds of the association. It merely charges that he failed to apply certain funds standing to the credit of depositor to the payment of his debt. It charges that he permitted him to do a perfectly lawful act, namely, to withdraw his own funds from the association and transfer them to another bank. *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

"This might be an act of maladministration on the part of the defendant. It might show neglect of official duty, indifference to the interests of the association or breach of trust, and subject the defendant to the severest censure and to removal from office; but to call it a criminal misapplication by him of the moneys and funds of the association, would be to stretch the words of this highly penal statute beyond all reasonable limits." *United*

States v. Britton, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

42. *United States v. Fish*, 24 Fed. 585.

43. Giving credit.—An indictment for such an offense, alleged to have been committed by discounting a certain note, is sustained by proof that defendant, as president of the bank, without the knowledge or consent of the directors discounted such note, which he knew to be worthless and insufficiently secured, crediting the proceeds on the books of the bank to the maker, subject to his check; that the maker drew a check for the amount in favor of a third person, who indorsed the same to defendant; and that defendant by means of such check paid a note held by the bank for which he was himself liable. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

44. Necessity for withdrawal of funds.—Mere proof that a depositor made and deposited fictitious checks, which were credited to his account, does not show a willful misapplication of the bank's funds, in violation of Rev. St., § 5209, unless it is further shown that some portion of the funds were withdrawn from the bank's control or possession, or converted in some way, so as to deprive the bank of the benefit thereof. *Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904.

Funds of a national bank are not misapplied by an officer for the purpose of constituting a criminal offense, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], merely by the drawing of a draft on a fund on deposit in another bank, or by entering a credit to a depositor on the books; but it is necessary that the fund should have been actually withdrawn or converted in some form, so that it is lost to the bank, and such loss must be averred in an indictment for the offense, and

assets of the bank, securities of little or no value, and procure an entry to be made to his personal credit of their face value, constitutes, *prima facie*, a wilful misapplication of the bank's funds, and the fact that he gave a personal guaranty that the securities were good and would be paid, does not alter the case, except that it may be considered on the question of the value of the securities and the intent of the president.⁴⁵ It is not necessary to show that the officer personally took any money from the bank, or was personally present when any other person took away money, to render him criminally liable. Where an officer of the bank makes false credits in favor of a firm of which he is a member, and causes the money represented by such credits to be paid to his firm by being drawn out of the bank by his partner in pursuance of an understanding had with him that the money should be so drawn, the credit having been made for that purpose, he will be guilty of violation of the statute.⁴⁶

Loan or Discount.—Directors or the managing committee of a national bank may, in the honest exercise of official discretion, make loans or discounts for the actual or supposed benefit of the association, and, although the transaction be injudicious, and actually result in loss to the bank, there is no criminal liability so long as their acts are not in bad faith, for personal gain or private advantage.⁴⁷ But the making or securing loans may constitute a misapplication of the bank's funds.⁴⁸ An officer is not guilty of misapplication of funds merely because he discounted a note not well secured.⁴⁹ But the discounting by the president of a national bank with the funds of the bank of commercial paper known by him to be worthless or

the facts set out showing it to have been unlawful. *United States v. Martindale*, 146 Fed. 280.

45. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

46. *United States v. Fish*, 24 Fed. 585.

47. **Loan or discount.**—*United States v. Harper*, 33 Fed. 471.

48. **By loans.**—*United States v. Harper*, 33 Fed. 471; *United States v. Fish*, 24 Fed. 585; *United States v. Breese*, 131 Fed. 915, reversed in 74 C. C. A. 388, 143 Fed. 250, on another point.

For an officer of a national bank who is also a promoter of various enterprises to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds which can not be covered up by entering the transactions on the books as loans and investments. *Walsh v. United States*, 98 C. C. A. 461, 174 Fed. 615. See post, "Aiding or Abetting," § 256 (5).

49. **By discounting note.**—"There is no provision of the statute which for-

bids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association." *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

"Whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a wilful misapplication of the funds of the bank, and subject him to a criminal prosecution." *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a wilful misapplication of its funds.⁵⁰ The mere renewal of a note by the officers of a national bank to cover a loan not sufficiently secured does not constitute a misapplication of the bank's funds, because the transaction is accomplished in the form of a discount of the renewal note, by placing the proceeds to the customer's credit and receiving from him a check against the fund for an amount sufficient to pay the old note, without the bank parting with any money.⁵¹

Declaration of Dividends.—The declaring of a dividend by the association when there were no net profits to pay it is not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of maladministration and nothing more, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution.⁵²

Purchase of Bank's Own Stock.—To constitute a willful misapplication of the funds of a national bank by an officer or agent thereof, there must be a conversion to his own use, or to the use of some one else. The offense is not committed where the president of a bank uses its funds to purchase shares of the stock, and holds them in trust for it, though such a purchase of its own stock, except to secure a debt due, is forbidden by law.⁵³

§ 256 (4) Receiving Deposits after Insolvency.—A state statute making it a felony for any person connected with a bank to receive deposits with knowledge that the bank was insolvent, is void, in so far as it applies to national bank officers, on the ground that it is an attempt to control and regulate the receipt of deposits by national banks, and in conflict with the laws of the United States authorizing national banks to receive deposits.⁵⁴

50. *Flickinger v. United States*, 79 C. C. A. 515, 150 Fed. 1.

51. *Adler v. United States*, 182 Fed. 464.

"If the money of a bank be misapplied by paying it out on worthless paper, it is obvious that a subsequent renewal of such paper upon which nothing was actually obtained could not have misapplied the money of the bank." *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

52. **Declaration of dividends.**—The act belongs to the same class as the purchase by a banking association of its own shares when not necessary to prevent a loss on a debt due it, which, in *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512, we held not to be a criminal misapplication of the funds of the association.

United States v. Britton, 108 U. S. 199, 27 L. Ed. 698, 2 S. Ct. 531; *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

53. **Purchase of bank's own stock.**—*United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *S. C.*, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525.

54. **Receiving deposits after insolvency.**—*Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288, reversing *State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389; *State v. Fields*, 98 Iowa 748, 62 N. W. 653.

Laws 1891, c. 43, § 16, relating to the receiving of deposits by officers of insolvent banks, and imposing a punishment therefor, does not apply to officers of national banks. *State v. Menke*, 56 Kan. 77, 42 Pac. 350.

§ 256 (5) Aiding or Abetting.⁵⁵—The aiders and abettors of an officer of a national bank need not themselves be officers of the bank or occupy any specific relation to the bank.⁵⁶ An indictment against the president of a bank for aiding and abetting the cashier in wrongfully certifying a check will not lie.⁵⁷

Conversion to Use of Defendant.—It is clear that the statute has been violated if the one charged with aiding and abetting is shown to have actually aided and abetted the officer of the bank in misapplying its funds, no matter whom the accused may have ultimately intended to benefit by his misconduct, provided, of course, there existed the intent to defraud enumerated in the act of congress.⁵⁸

Conspiracy.—To authorize a conviction for the offense of aiding and abetting an officer, it is not necessary to show a conspiracy.⁵⁹ It is not an essential element of the offense of aiding and abetting that there be a common purpose between the officer and the aider and abettor to promote or subserve the joint interest of the wrongdoers in enterprises in which they are mutually interested.⁶⁰

55. Aiding or abetting.—As to statute, see ante, "In General," § 256 (3a).

56. Relation to bank.—The language of the statute fully answers this contention. It provides that "every president, director, cashier, teller, clerk, or agent of any association, who," etc., and adds, after defining the acts which are made misdemeanors, "that every person who with like intent aids and abets," etc. The phrase, "every person," is manifestly broader than the enumeration made in the first portion of the statute. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394, reaffirmed in 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

"The citation made from *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580, is not opposite. True, we there said: 'The acts charged against Fuller could only be committed by him by virtue of his official relation to the bank; the acts charged against the defendant likewise could only be committed by him in his official capacity.' But in that case the indictment itself charged Northway, as president and agent, with aiding and abetting Fuller, the cashier of the bank, and the language quoted referred to the matter under consideration, and hence it was incidentally stated that the proof and averment must correspond." *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

One who has an interest in a company for the benefit of which the president of a national bank criminally mis-

applies its funds may be guilty as an aider and abettor in such misapplication, although the president has no interest in or relation to him, or to said company, and although he has no interest in the bank, or with the president thereof, of any kind. *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943, distinguishing *State v. Teahan*, 50 Conn. 92.

57. President of bank.—Under Act July 12, 1882, c. 290, § 13, amendatory of Rev. St., § 5208, which makes it a misdemeanor for "any officer, clerk, or agent of any national banking association" to "certify any check" drawn by a person who did not then have on deposit sufficient money to meet the same, an indictment against the president for "aiding and abetting" the cashier in certifying checks under the prohibited circumstances can not be sustained. *United States v. Potter*, 56 Fed. 83.

58. Coffin v. United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943. See ante, "In General," § 256 (3a).

59. Conspiracy.—*United States v. Hillegrass*, 176 Fed. 444.

60. Common purpose.—Not only may one not an officer or agent of the bank be, under some circumstances, an aider or abettor in violation of § 5209, Rev. Stat., but in order to be such aider or abettor, the person so charged, when not an officer of the bank, need not stand in any particular relation to the recreant bank officer, or have such interest with him in other enterprises,

Same Grade of Offense as Principal.—The offenses of the principal and accessory are both misdemeanors and of the same grade.⁶¹

Conviction of Principal.—To authorize a conviction it is not necessary to show that the principal had been convicted.⁶²

Knowledge of Character of Principal.—And it is not necessary in charging a national bank president with aiding and abetting the cashier of a bank, in the misapplication of the funds of said bank, to charge that the defendant then and there knew that said cashier was such cashier.⁶³

Excess of Authority by Principal.—To make the defendant guilty of aiding and abetting a misapplication of the bank's funds by procuring a fraudulent discount of a note, it is not necessary that his principal acted in excess of his powers or outside of his regular duties.⁶⁴

Discount of Unsecured Note.—While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity,⁶⁵ yet if his original in-

"as that they may work together for the hurt of the bank for a common purpose." *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943, reaffirming *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

61. *United States v. Hillegrass*, 176 Fed. 444.

62. *United States v. Hillegrass*, 176 Fed. 444.

63. **Knowledge of official character of principal.**—The acts charged against the cashier could only be committed by him by virtue of his official relation to the bank; the acts charged against the defendant likewise could only be committed by him in his official capacity. Both are alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the coexistence of this official relation on the part of both towards the same corporation. It is as cashier that he was aided and abetted by the defendant in the commission of his offense. This allegation necessarily imputes knowledge of his official character. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

Whether the fact that the aider or abettor knew that the person who misapplied the funds was an officer, etc., must be specifically charged, or not, it may be observed that it has no application to this cause. Each and every count here specifically avers that "the said Theodore P. Haughey, then and there being president of the bank," and "then and there by virtue

of his said office as such president as aforesaid," "misapplied the funds" and having thus fully averred the relation of Haughey to the bank, and the commission of the acts complained of in his official capacity with intent to defraud, etc., the counts go on to charge that the plaintiffs in error did unlawfully, willfully, feloniously, knowingly, and with intent to defraud, aid, and abet the "said Haughey as aforesaid." The words "as aforesaid" clearly relate to Haughey in the capacity in which it is stated that he committed the offense charged against him in the body of the indictment. Without entering into any nice question of grammar, or undertaking to discuss whether the word "said" before Haughey's name and the words "as aforesaid" which follow it are adverbial, the plain and unmistakable statement of the indictment as a whole is, that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also knowingly done by assisting him in the official capacity in which alone it is charged that he misapplied the funds. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394, reaffirmed in 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

64. *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

65. **Discount of unsecured note.**—*Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934, followed in 153 U. S. 608, 38 L. Ed. 839, 14 S. Ct. 939. See ante, "Means of Commission of Offense," § 256 (3b).

tent was to procure the note to be discounted in order to defraud the bank, every element of criminality is present.⁶⁶

Overdraft by Depositor.—An unintentional overdraft by a depositor in good standing and possessing ample means to pay, or an overdraft to be paid pursuant to a prior agreement resting on abundant credit, does not constitute a willful misapplication of a national bank's funds.⁶⁷ A depositor may knowingly overdraw his account, and be innocent of any unlawful purpose; but if he does so for considerable amounts, without the knowledge and consent of the proper officials, and with a fraudulent intent that the moneys of the bank shall be applied to their payment by the teller without the knowledge or consent of the proper officials, he is guilty,⁶⁸ and it is immaterial that he intended finally to recompense the bank, through successful operations in stocks or otherwise.⁶⁹ A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of an overdraft, made with intent to defraud, and converts the same to his own use, in fraud of the bank, is guilty of a misapplication of the funds of the bank.⁷⁰

§ 257. — Prosecution and Punishment—§ 257 (1) Requisites and Sufficiency of Indictment—§ 257 (1a) Necessity for Indictment.—The crime of embezzlement and making false entries as the president of a national bank, in violation of § 5209, Revised Statutes, which prescribes the punishment of imprisonment for not less than five years nor more than ten years, which imprisonment may be ordered to be executed in a state jail or penitentiary, can not be prosecuted on information, but only on presentment or indictment by a grand jury, it being an infamous crime.⁷¹

66. "In this particular of an intent to defraud, the case is distinguishable from that of *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526, in which the charge was that the defendant, being president and director of the association, and, being insolvent, procured his own note to be discounted, the same not being well secured, the payee and the endorser thereof being also insolvent, which he, defendant, well knew. The incriminating facts were that the note was not well secured, and that both the maker and endorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question there presented was whether the procuring of the discount of such a note by an officer of the association was a willful misapplication of its moneys within the meaning of the law. It was held that it was not. The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on

the part of the defendant to defraud the bank of the amount." *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

67. **Overdraft by depositor.**—*United States v. Steinman*, 172 Fed. 913. See ante, "Means of Commission of Offense," § 256 (3b).

68. If, at the time defendant drew checks upon a national bank, he knew or had reason to believe that they were to be fraudulently paid by the teller out of the funds of the bank, and not from any funds to which defendant could legitimately resort, he had a guilty intent. *United States v. Kenney*, 90 Fed. 257.

69. *United States v. Kenney*, 90 Fed. 257.

70. *United States v. Warner*, 26 Fed. (U. S.), 616.

71. **Necessity for indictment.**—*United States v. DeWalt*, 128 U. S. 393, 32 L. Ed. 485, 9 S. Ct. 111.

"In *Mackin v. United States*, 117 U. S. 348, 29 L. Ed. 909, 6 S. Ct. 777, this

§ 257 (1b) Embezzlement, Abstraction and Misapplication.—An indictment against an officer or director of a national bank for willful embezzlement or misapplication of its funds, in order to advise the defendant of the issues to be met, must set forth all the facts necessary to show how the embezzlement or misapplication was made, and that it was an unlawful one.⁷²

Sufficiency of Charge.—An indictment for a criminal misapplication of the funds of a national bank, which fully describes the act constituting the alleged offense, so as to advise the accused of the particular transaction which is called in question, and the act is averred to have been done willfully and with intent to injure and defraud the bank, and without its knowledge and consent, and it is alleged that it was done for the use, benefit, and advantage of the accused, or some company or person other than the bank, is sufficient.⁷³ An indictment is sufficient which avers that the defendant was president of a national bank; that by virtue of his office he took into his possession certain bonds (fully described), the property of the bank; and that, with intent to injure and defraud the association, he embezzled the bonds, and converted them to his own use.⁷⁴ An indictment charging

court held, speaking through Mr. Justice Gray, 'that, at the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment.' United States v. DeWalt, 128 U. S. 393, 32 L. Ed. 485, 9 S. Ct. 111.

And so also of making a false report or statement under the same statute. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849, 7 S. Ct. 781.

72. Embezzlement, etc.—United States v. Martindale, 146 Fed. 280.

False and fictitious credits.—Under an indictment charging that the misapplication was made by the drawing of checks on the bank, and obtaining their payment when he had in fact no money on deposit, where it appeared on the trial that defendant had an apparent credit on the books of the bank sufficient to cover the checks, the government can not impeach such apparent credit by showing that a deposit previously entered on the books to the credit of defendant's account was false and fictitious, and the entry thereof fraudulently procured by defendant; no such transaction being charged in the indictment. United States v. Martindale, 146 Fed. 280.

Description of funds and credits.—An indictment under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], is bad for insufficient description of the offense, where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national

bank by defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount either of "funds" or of "credits" so embezzled or misapplied. United States v. Smith, 152 Fed. 542.

An indictment under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with the willful misapplication of its "money, funds, and credits," must contain a particular description of the funds and of the credits charged to have been so misapplied, and show how much there was of money and of funds and of credits separately. United States v. Smith, 152 Fed. 542.

An indictment under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], charging that defendant, as president of a national bank, willfully misapplied a certain sum of the "funds and credits" of the bank by discounting the note of a person known to be insolvent, the proceeds of which were divided between such person and defendant, is insufficient in its description of the offense, where it does not use the word "moneys," nor in any way describe the funds or credits charged to have been so misapplied. United States v. Smith, 152 Fed. 542.

73. Rieger v. United States, 47 C. A. 61, 107 Fed. 916.

74. Claassen v. United States, 142 U. S. 140, 35 L. Ed. 966, 12 S. Ct. 169.

Charge for abstraction.—Where a

the defendant, as president and director, with having willfully misapplied certain credits of the bank, by procuring the authority of the board of directors to an acceptance of an assignment of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, does not state an offense under the statute, since the facts set out do not show a misapplication of credits by defendant.⁷⁵

Sufficiency on Demurrer.—It is no ground of objection, on demurrer to an indictment against a national bank officer for willful misapplication of the bank's funds, that the jury may draw from all the testimony the inference that the transaction amounted to no more than a legal overdraft.⁷⁶

In Language of Statute.—In a prosecution of a national bank officer for willful misapplication of the moneys, funds, and credits of the bank, the indictment properly alleged facts showing how the misapplication was made and the illegality thereof; the words willful misapplication having no settled technical meaning.⁷⁷

Certainty of Charge.—An indictment under the National Banking Act is sufficiently certain where it contains every element of the offense alleged; sufficiently appraises the defendant of the charge, and supplies record evidence on which a plea of former acquittal or conviction may be founded.⁷⁸

count of an indictment under § 5209, Rev. Stat., for the offense of abstracting the moneys and funds of the association, in substance charges that the defendant was president and agent of the National Bank, theretofore duly organized and established, and then existing and doing business, under the laws of the United States; and that the defendant, being president and agent as aforesaid, did then and there "willfully and unlawfully, and with intent to injure the said banking association, and without the knowledge and consent thereof, abstract and convert to his own use certain moneys and funds of the property of said association, of the amount and value," etc., there is no reason to doubt the sufficiency of this description of the offense. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

⁷⁵. *United States v. Smith*, 152 Fed. 542.

⁷⁶. *United States v. Heinze*, 161 Fed. 425.

⁷⁷. **In language of statute.**—*United States v. Heinze*, 161 Fed. 425. See *Breese v. United States*, 45 C. C. A. 535, 106 Fed. 680, reversed in 48 C. C. A. 36, 108 Fed. 804; *United States*

v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

⁷⁸. **Certainty of charge.**—Under Rev. St., § 5209, providing for the punishment of an officer or agent of a national banking association who willfully misapplies its assets, an indictment charging that the accused did unlawfully, fraudulently, and willfully misapply and convert to his own use the assets of a national bank, with the intent then and thereby to injure and defraud the association, which conversion was done by some means and in some manner to the grand jury unknown, is not bad for want of certainty, in that it does not otherwise allege how the funds were misapplied by defendant. Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed. *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

"Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently

An averment that defendant misapplied certain moneys, funds, and credits of the bank does not render the indictment bad for indefiniteness, where it is followed by an explicit statement that the misapplication was committed by means of discounting a note, sufficiently described, which was known by him to be worthless.⁷⁹ A count in an indictment, charging that the defendant, as a director of a national bank, between certain given dates abstracted and misapplied a stated sum of the moneys, funds, and credits of the bank, without further specification, is insufficient, as too general and indefinite.⁸⁰ An indictment against a defendant for the embezzlement and abstraction of the property of a national banking association is not demurrable because it charges the receipt of the property by him in different capacities, both as an officer and as an agent of the association.⁸¹

apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934; *Batchelor v. United States*, 156 U. S. 426, 39 L. Ed. 478, 15 S. Ct. 446." *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove, although the note which defendant is charged with receiving and misappropriating, might have been delivered to the defendant for a score of honest purposes, which it would be utterly impossible to anticipate, neither in criminal nor in civil pleading is it required to anticipate or negative a defense. *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

Where the bank alleged to have been defrauded by its president was referred to in the indictment of the latter as "a certain national banking association, then and there known and designated as the National Granite State Bank, which said association had been heretofore created and organized under and by virtue of the laws of the United States of America, and which said association was then and there acting and carrying on a national banking business at the city of Exeter un-

der the laws aforesaid," and the evidence offered proved that the authorized name of the bank was the National Granite State Bank of Exeter, the omission of the words "of Exeter" was not a material variance, if the bank carried on its business and was as well known by the one name as the other. *Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923.

Certainty in description of bank.—Where the language of an indictment is that the defendant "was then and there president and agent of a certain national banking association, to wit: 'The Second National Bank of Jefferson,' theretofore duly organized and established and then existing and doing business at the village of Jefferson and county of Ashtabula, in the division and district aforesaid under the laws of the United States," this can mean only that it was organized and established as a banking association under the act of congress authorizing the organization and establishment of national banks, and that it was in existence and doing business at the time of the alleged offense as such national banking association. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

79. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

80. *United States v. Martindale*, 146 Fed. 280.

81. Description of defendant as president and agent.—Averments in such an indictment that defendant was appointed agent in liquidation for the association, and accepted that office, are not inconsistent with further averments that he afterwards acted as president, clerk, and director of the association. *United States v. Jewett*, 84 Fed. 142, judgment affirmed. *Jewett v.*

Described as Larceny.—The offense of abstracting the funds of the bank is not so equivalent to the offense of larceny that, in an indictment for the abstracting, the offense must be described by the words used to describe larceny.⁸²

Negating Defenses.—An indictment for misapplication of the bank's funds need not negative every possible defense.⁸³

An indictment for willfully misapplying funds of a national bank charging in general words fraudulent misapplication and intent to defraud the bank, and describing specifically funds misapplied and the manner of misapplication, need not negative every possible theory consistent with an honest purpose in the disposition of the funds specified.⁸⁴ But in an indictment charging the president of a national bank with the willful misapplication of its funds, by buying therewith certain shares of its stock, the exception contained in the section prohibiting a national bank from purchasing its own shares, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, must be negated.⁸⁵

In Separate Counts.—The distinct offenses of embezzlement, abstraction and misapplication must be charged in separate counts.⁸⁶ Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each pay-

United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

The counts are bad also for repugnancy, in that they aver that the defendant purchased the shares of the association, and held them in trust for the association. This charge, without further averments, is clearly repugnant. United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

"The allegation is not uncertain, as it might have been if it had been 'president or agent.' In that case, it might have been urged, that, as the offense was charged to have been committed by the defendant either as president or agent, it was uncertain in which of these capacities he was charged. For, although it might be said that a president is ex officio agent of the association, there may be many agents who are not president." United States *v.* Northway, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

"Neither is the description contradictory, because he may be both president and agent. There is no repugnance in the two characters. Even on the supposition that the statute means to make a distinction between the two offices of president and agent, there is nothing in the nature of either to prevent them both being held at the same time by one person, and the acts charged may in contemplation of law

have been committed by him in both capacities. A fortiori may this be the case, if every president of such an association is to be held by virtue of his office to be also, within the meaning of the act, an agent of the association. In that case, the use of the words 'and agent' would be mere surplusage in the indictment." United States *v.* Northway, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

President, director, and agent.—An indictment charging one, as "president, director, and agent," of a national bank in process of liquidation, with willfully misapplying the assets of the bank, is not bad because of inconsistency. Judgment, United States *v.* Jewett, 84 Fed. 142, affirmed. Jewett *v.* United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

^{82.} United States *v.* Northway, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

^{83.} **Negating defenses.**—Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

^{84.} Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934; S. C., 153 U. S. 608, 38 L. Ed. 839, 14 S. Ct. 939.

^{85.} United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

^{86.} United States *v.* Cadwallader, 59 Fed. 677.

ment constitutes a separate misapplication, and must be charged in a separate count.⁸⁷

Several Offenses in One Indictment.—Embezzlement, abstraction, and willful misapplication of the moneys and funds of a national bank, constitute three separate crimes or offenses, which may be joined in one indictment, but must be stated in separate counts.⁸⁸

Reference to Other Parts of Charge.—Where every element of the offense is set forth in the earlier part of a count, there is no necessity of repeating it when the particular credit misapplied as described.⁸⁹

Intent.—An indictment alleging that the defendant, being an officer of the bank, willfully and fraudulently, with intention to defraud the association, did misapply certain moneys, funds and credits of the bank, constitutes a sufficient allegation of a criminal intent to defraud.⁹⁰ An indictment charging an officer of a national bank with misapplication of its funds, or with making false entries in its books, need not allege that the acts were done feloniously, where they are charged to have been done willfully and with intent to defraud the bank, and are such as are made misdemeanors by the statute.⁹¹ It has been held that the indictment need not allege an intent to defraud and injure the bank.⁹²

Possession of Funds.—An indictment for embezzlement must allege that the moneys or funds were entrusted to the possession of the defendant,⁹³ but an indictment for abstraction or misapplication need not.⁹⁴ An

87. *United States v. Martindale*, 146 Fed. 280.

88. *United States v. Cadwallader*, 59 Fed. 677.

89. *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

90. **Charge as to intent.**—*United States v. Morse*, 161 Fed. 429.

An allegation that defendant, an officer and agent of a national banking association, did secretly, in a manner and by particulars to the jurors unknown, willfully, unlawfully and fraudulently convert to his own use, and misapply, from said association to himself, certain funds, sufficiently charges the offense of "willful misapplication" of property, under Rev. St., § 5209. *United States v. Jewett*, 84 Fed. 142, judgment affirmed, *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

Charge in language of statute.—An indictment of the president of a national bank, under Rev. St., § 5209, for making a false entry in its account books, "to injure and defraud said association, and certain persons to the grand jurors unknown," following the language of the statute, sufficiently charges the intent with which the offense was committed, and is not repug-

nant or impossible. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

91. *United States v. Eastman*, 132 Fed. 551.

92. An indictment of the president of a national bank, under Rev. St., § 5209, providing that where an officer, without authority from the directors, draws a bill of exchange, with an intent to defraud the association, he shall be guilty of a misdemeanor, need not allege the drawing of the bill to have been with intent to injure and defraud the association. *United States v. Johnson*, Fed. Cas. No. 15,483.

93. **Necessity for charge as to possession.**—*United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

An indictment of a president of a national banking association, under Rev. St., § 5209, providing for the punishment of embezzlement by any clerk, officer, or agent of a national bank, must show that the moneys were lawfully intrusted to his possession. *United States v. Johnson*, Fed. Cas. No. 15,483.

94. So far as the indictment charges the defendant with a willful misapplication of the funds of the bank, it is

indictment charging that the funds alleged to have been embezzled were at the time of the possession of the defendant as president and agent, means that they had come into his possession in his official character, so that he held them in trust for the bank, and fully and exactly describes the offense of embezzlement under the act.⁹⁵

Manner in Which Made.—An indictment for embezzlement, abstraction or misapplication must allege the manner in which made.⁹⁶ An indictment alleging that the defendant, as cashier of a national bank, unlawfully converted certain moneys, funds and credits to the use of himself or of another than the bank sufficiently charges the manner in which the misapplication was effected.⁹⁷ An indictment charging that the defendant, president of a national bank, procured a note to be discounted, well knowing the maker and indorser thereof to be insolvent, implies that he submitted it to its directors or other authorized officers, and does not charge a misapplication of the funds of the bank.⁹⁸ It is possible for an officer of a banking association, with intent

not necessary to allege that they had previously been intrusted to the defendant. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

An indictment of an officer of a national bank, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], for misapplication of funds, sufficiently alleges his possession of the funds by an averment that he was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in their control, management, and application. *United States v. Eastman*, 132 Fed. 551.

95. Sufficiency of charge as to possession.—In respect to the counts for embezzlement, it is quite clear that the allegation is sufficient, as it distinctly alleges that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. This necessarily means that they had come into possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This fully and exactly describes the offense of embezzlement under the act by an officer and agent of the association. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

There can be no doubt of the sufficiency of a count of an indictment which avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession

certain bonds (fully described), the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *Claassen v. United States*, 142 U. S. 140, 35 L. Ed. 966, 12 S. Ct. 169.

96. Manner in which made.—*Batchelor v. United States*, 156 U. S. 426, 39 L. Ed. 478, 15 S. Ct. 446; *United States v. Heinze*, 161 Fed. 425.

97. Sufficiency of charge as to manner in which made.—*Dickinson v. United States*, 86 C. C. A. 625, 159 Fed. 801.

An indictment of an officer of a national bank, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], for misapplication of the funds or property of the association, sufficiently alleges the manner in which the misapplication was accomplished where it charges that, having access to the funds and properties of the bank, he willfully, unlawfully, fraudulently, and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. *United States v. Eastman*, 132 Fed. 551.

98. United States v. Britton, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

Charge of "willful misapplication" insufficient.—By the settled rules of criminal pleading, and by the previous decisions of this court, the words "willfully misapplies," in Rev. Stat., § 5209,

to defraud it, to misappropriate its funds in the purchase for its use of its own stock. But the count which avers such an act should also make other averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication, by which it was possible that the association could be defrauded.⁹⁹

Conversion to Use of Defendant.—An indictment against an officer of a national bank for willful misapplication of funds of the bank, must allege facts showing a conversion of such funds.¹ An indictment against an officer of a national bank for embezzlement, abstraction or misapplication, which shows that the officer wrongfully used the bank's moneys or funds for his own or for a person's other than the bank's purpose or benefit, suffi-

having no settled technical meaning (such as the word "embezzle" has in the statutes, or the words "steal, take and carry away" have at common law), do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing now the misapplication was made, and that it was an unlawful one. Without such averments, there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause. *Batchelor v. United States*, 156 U. S. 426, 39 L. Ed. 478, 15 S. Ct. 446; *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580; *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

Where counts simply charge that the defendant, being president of the association, willfully misapplied its moneys and funds by buying therewith certain shares of its stock, with intent to injure and defraud the association and certain persons to the grand jurors unknown, the words "willfully misapplied" are new in statutes creating offenses, and they do not, therefore, of themselves fully and clearly set forth elements of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. There must be averments to show how the application was made and that it was an unlawful one. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

99. Misapplication by purchase of

bank's own stock.—The purchase of stock in violation of § 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said § 5209, Rev. Stat., is not a crime punishable under the latter section as a willful misapplication of funds. It should have been averred that the purchase was not necessary to prevent loss upon a debt previously contracted in good faith. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

1. Conversion to use of defendant.—An indictment which charges that defendant, as president, with intent to defraud the bank, and for the benefit of himself and others unnamed, caused the bank to discount single name commercial paper, and that the bank lost the amount paid on the discount, does not charge an offense. *United States v. Heinze*, 183 Fed. 907.

An indictment for misapplication of the funds or credits of a bank which fails to show they were converted to the use of the defendant or another other than the bank is insufficient. *United States v. Smith*, 152 Fed. 542.

An indictment for the willful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of Rev. St. U. S., § 5209 (U. S. Comp. St. 1901, p. 3497), by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it does not allege a conversion by such officer. *United States v. Heinze*, 218 U. S. 532, 54 L. Ed. 1139, 31 S. Ct. 98.

ciently alleges an appropriation to his own or such other's use.² Where all other elements of the offense are properly alleged it is sufficient to allege generally an application to the use of the defendant or a person other than the bank.³

Injury to Bank.—An indictment is insufficient in the absence of averments that the bank was in fact injured or of a probability that it would be injured.⁴

2. Sufficiency of charge as to conversion.—Where the facts averred in an indictment against an officer of a national bank for embezzlement show that defendant wrongfully used the bank's money in his care and under his control for the purpose of bribing certain city officials in his own interest, it sufficiently avers an appropriation to his own use, and is not vitiated by further averments that there was an intent to wrongfully convert the money to the use of such officials, and that it was so converted. *McKnight v. United States*, 38 C. C. A. 115, 97 Fed. 208.

An indictment alleging that defendants, being officers of a national banking association, willfully and fraudulently, and with intent to injure and defraud the association for the use and advantage of M., misapplied certain money of the association, to wit, \$126,000, and that M. made a certain check on the bank payable to H. for \$126,000, and delivered the same to him, defendant M. knowing at the time that he did not then have on deposit with the bank the amount specified therein, but that M. as vice president and C. as president caused the check to be paid from moneys of the association, with intention on the part of M. to convert the amount to his own use, repayment not having in any way been secured and M. having no right or title thereto, stated an offense under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), declaring that every president, director, cashier, etc., of any national banking association, who willfully misapplies any of the moneys, funds, or credits of the association, shall be guilty of a misdemeanor, and was not fatally defective for failure to charge that the overdraft payment was unauthorized, that it was an actual conversion of the amount paid, or that the money was in some way absolutely lost to the bank. *United States v. Morse*, 161 Fed. 429.

Payment of money on check.—An indictment charged that H. did misapply the moneys of the bank with in-

tent to convert a certain sum to the use of a specified company, by causing it to be paid out of the moneys of the bank on a check drawn on the bank by such company, which check was then and there cashed and paid out of the bank's funds, which sum, and no part thereof, was such company entitled to withdraw from the bank, because it had no funds therein, and that said company was then and there insolvent, as H. well knew, whereby said sum became lost to the bank. Held, that the indictment averred the actual conversion of the sum misapplied. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

Discounted note for his own use.—A conversion is charged by the allegation of an indictment for willful misapplication of the funds of a national bank, in violation of Rev. St. U. S., § 5209 (U. S. Comp. St. 1901, p. 3497), that defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, received and discounted a promissory note for a specified sum, for his use, benefit, and advantage, knowing that the note was wholly unsecured, whereby the proceeds of the discount were wholly lost to the bank. *United States v. Heinze*, 218 U. S. 532, 54 L. Ed. 1139, 31 S. Ct. 98.

3. Rieger v. United States, 47 C. C. A. 61, 107 Fed. 916.

4. Injury to bank.—An indictment under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), which charges that defendant, while an officer of a national bank, with intent to injure or defraud the bank, unlawfully and willfully misapplied and converted to his own use funds of the bank by withdrawing money therefrom upon a charge ticket, pursuant to which the amount was charged to his account, is insufficient to charge an offense, in the absence of averments showing that the bank was in fact defrauded, or a probability that it would be defrauded, thereby, as that defendant was insolvent, and that the overdraft

Duty of Officer.—An indictment charging that the defendant, president of a national bank, permitted a depositor, who was indebted to the association, and whom he knew to be insolvent, to withdraw his deposit, and failed to cause it to be applied to the indebtedness, without alleging that he was the duly-authorized officer of the association whose duty it was to look after the accounts of depositors, fails to charge a willful misapplication of the funds of the bank.⁵

Unlawfulness of Act.—An indictment for willfully misapplying the moneys, funds and credits of a national bank, of which the defendant was president, as well as a director and agent, must supplement the allegation of willful misapplication by allegations showing how the misapplication was made, and that it was an unlawful one.⁶

To Knowledge and Consent of Directors.—It is not essential that an indictment for misapplication should allege that the acts charged were done without the knowledge and assent of the directors of the association,⁷ for

was not paid. *United States v. Norton*, 188 Fed. 256.

An indictment under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), which charges that defendant, while president of a national bank, with intent to injure and defraud the bank, unlawfully and willfully misapplied and converted to his own use, by paying to himself the amount of a draft drawn by a customer on a third party to whom the bank was not indebted, does not charge an offense; there being no averment that the drawee was not solvent, or of other facts showing that the draft which defendant caused the bank to cash was not collectible. *United States v. Norton*, 188 Fed. 256.

5. *United States v. Britton*, 108 U. S. 193, 27 L. Ed. 701, 2 S. Ct. 526.

6. **Charge that act unlawful.**—A general allegation, at the beginning of the count in question, that the defendant, on January 1, 1891, and at divers times between that date and July 8, 1893, being president, director and agent of a certain national banking association, did, as such president, director and agent, "willfully misapply forty thousand, four hundred and twenty-one dollars and seventy-nine cents, of the moneys, funds and credits then and there belonging to and the property of said association, in the manner following," is insufficient, unless the acts afterwards alleged amount to a willful misapplication of funds of the association, within the meaning of the statute, as in this indictment they do not. See statement of case for form of indictment. *Batchelor v. United States*, 156 U. S. 426, 39 L. Ed. 478, 15 S. Ct. 446.

An indictment against the president

of a national bank for misapplication of its funds alleged that he "unlawfully and willfully, and with intent to injure and defraud the said association for the use, benefit, and advantage of himself, did misapply certain of the money and funds of said association, which he * * * then and there, with the intent aforesaid, paid and caused to be paid" to certain persons named. Held, that the indictment was bad for failure to allege the facts that made such payment unlawful or criminal. *United States v. Eno*, 56 Fed. 218.

7. **Knowledge and consent.**—*United States v. Eno*, 56 Fed. 218. But see *United States v. Martindale*, 146 Fed. 280; *United States v. Smith*, 152 Fed. 542.

An averment in an indictment, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], charging that defendants, as director and cashier of a national bank, by means of a draft drawn by them or by other stated means misapplied the moneys, funds, and credits "of said association without the knowledge and consent thereof," is not equivalent to an averment that the act was done without the knowledge and consent of the directors, as required by the statute, and is insufficient. *United States v. Martindale*, 146 Fed. 280.

In an indictment under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], charging an officer of a national bank with a willful misapplication of its funds with intent to injure and defraud the association, it is not necessary to aver that the acts set out were done without authority from the directors. *Flickinger v. United States*, 79 C. C. A. 515, 150 Fed. 1.

such knowledge and assent would not relieve the president from liability for an unlawful or criminal misappropriation of the bank's funds.⁸ It is not a substantial defect in an indictment to aver that the misapplication of the funds was without the knowledge and consent of the bank, its directors, etc., instead of using the disjunctive form of averment.⁹

Description of Defendant.—An indictment charging the defendant with committing the offense charged as president and agent, is good.¹⁰

Description of Bank.—An indictment charging one with the offense of embezzlement as president of a certain national bank, "duly organized and doing business at the village of," etc., sufficiently states that the bank was organized under the National Banking Act to carry on the business of banking.¹¹ An indictment charging one, as agent of a national banking association, with willfully misapplying the assets of the association, need not allege that the association is carrying on a banking business.¹²

Description of Moneys, etc.—Where, in a prosecution against a national bank officer for willful misapplication of the moneys, funds, and credits of the bank, the indictment definitely charged the value in lawful money of the United States of the misapplied property, it was not defective for failure to specify the exact thing misapplied, whether moneys, funds, or credits.¹³ An indictment which, following the words of the statute, charges the president of the bank with embezzling, abstracting, and misapplying moneys, funds, and credits of the bank at various times need not specify how much was moneys, how much funds, and how much credits.¹⁴ An indictment charging the embezzlement of "moneys and funds" is defective.¹⁵

Description of Check or Note.—An indictment is not fatally defective for failure to state who was payee of a check the proceeds of which are alleged to have been converted by the defendant.¹⁶ In an indictment

8. *United States v. Eno*, 56 Fed. 218.

9. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

10. *United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

11. **Description of bank.**—*United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

12. **Bank doing business.**—Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed. *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

An indictment against a national bank cashier for an offense against the national banking law was not defective for failure to allege that the bank was doing business at the time the alleged offenses were committed. *Geiger v. United States*, 89 C. C. A. 516, 162 Fed. 844.

13. **Description of money, funds,**

etc.—*United States v. Heinze*, 161 Fed. 425.

14. *Breese v. United States*, 45 C. C. A. 535, 106 Fed. 680, judgment reversed on rehearing 48 C. C. A. 36, 108 Fed. 804, on another point.

15. **Moneys and funds.**—An indictment under Rev. St., § 5209, for embezzlement, which charges that defendant did have and receive "certain of the moneys and funds of said national banking association of the amount and value of \$5,723.93," is defective in not stating what the property was which defendant is accused of misappropriating, the word "funds" including several species of property. *United States v. Greeve*, 65 Fed. 488.

16. **Description of check.**—Where an indictment against a national bank cashier for willful misapplication of the bank's funds and willful abstraction thereof alleged that a customer of the

charging an officer of a national banking association with the willful misapplication of certain moneys, funds, and credits of the bank by using the same to discount an unsecured note of a person known to be insolvent, such note does not constitute the subject-matter of the offense, and need not be set out in *hæc verba*. A description by giving the date and amount and the name of the maker, so as to advise the accused with reasonable certainty what note is intended, is sufficient.¹⁷

§ 257 (1c) False Entries or Reports.—An indictment charging the making of a false entry in the books or reports of the national bank must aver that the defendant was the president or other officers of the bank, which was carrying on a banking business; that the defendant made in a book, report or statement of the bank, describing it, a false entry, describing it; that such false entry was made with intent to injure or defraud the bank, or to deceive any agent, describing him, appointed to examine the affairs of the bank; and the time and place of such acts.¹⁸ An indictment for making false entries or reports is sufficient if it clearly advises the defendant of the exact charge he is required to meet.¹⁹

Argumentative, Repugnant and Duplicious.—An indictment charging the defendant with making a false entry of payment of interest to the

bank, prior to the maturity of a note held by the bank against it, delivered a check to the bank to pay the note when due, which check came into defendant's possession as cashier, and that defendant cashed the check and converted the proceeds, the indictment was not fatally defective for failure to allege in words as to who was the payee of the check, nor to charge that the bank was still the owner of the note. *Geiger v. United States*, 89 C. C. A. 516, 162 Fed. 844.

17. Description of note discounted.—*Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

18. False entries or reports.—*United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512, reaffirmed in *United States v. Britton*, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525.

In a prosecution under U. S. Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], making it a crime for an officer of a national banking association carrying on a banking business to make a false entry in a report or statement of the association with intent to injure or defraud it, or to receive an agent appointed to examine its affairs, the indictment alleged that accused was the duly elected, qualified, and acting cashier of a certain bank; that he made a false entry in a report, describing it; that the entry was made to deceive a certain person who was the duly

elected, qualified, and acting president of that bank; that he made the false entry on a certain date in a report showing the resources and liabilities of the bank on a certain day to the comptroller of the currency. Held, that the indictment was sufficient. *Harper v. United States*, 7 Ind. T. 437, 104 S. W. 673.

An indictment of the president of a national bank, under Rev. St., § 5209, charging him with having made a false entry in one of its account books known as "Profit and Loss No. 6," as follows: "Richard L. Dickson, 182 days' int., 8 per cent, 132,673.49, to July 1, '76,—5,365.88;" purporting thereby to show that \$5,365.88 had been received by said association on account of interest due from said Dickson, with intent to defraud the association, or to deceive any agent appointed to examine its affairs—is not defective because it fails to allege that the entry was in an account of and in the due course of business of the bank, or that the interest in question was due; or on the ground that the entry is without significance, and unintelligible; or that it is not calculated to deceive a bank examiner; or because it is not alleged that, at the time the entry was made, an examiner had been appointed. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

19. Dorsey v. United States, 41 C. C. A. 652, 101 Fed. 746.

bank by a certain person is not rendered argumentative or repugnant because it does not charge that such interest was due.²⁰ A count of an indictment which charges that a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity, as it includes two separate and distinct offenses.²¹

Errors and Omissions.—An erroneous statement of the amount of reserve in the bank does not invalidate the indictment.²² The omission of the signs for dollars and cents in the recitals of the alleged false entries in the reports, and misnomer of the reports, are immaterial, where the reports are set out by their tenor in the indictment, so that these discrepancies are the most mere matter of form, within the meaning of Rev. St., § 1025, for which the indictment is not to be deemed insufficient.²³

Negating Defenses.—When the indictment alleges that the false entries in question indicated that there was then in the paying teller's department of the bank a certain amount in gold, legal tenders, and gold certificates, when such amount was not there in fact, it is not necessary that it should further allege that such amount was not then in other departments

20. Argumentative or repugnant charge.—Where the charge is that a false entry was made on the books of the association which purported that a certain sum was, on a day named, received from a person named, on account of interest then and there due from him to the association; that the said sum was not then and there received on account of interest due, and was not received on any account from any sources whatever, the falsity of the entry does not consist in the fact that there was no interest due from the person named, but in the fact that money, which the entries declared had been received from him on account of interest due, had not been received from him on that or any other account. It was, therefore, entirely unnecessary to aver that no such interest was due, and the want of such averment does not render the counts argumentative or repugnant. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

Where the intent is charged to be "to injure and defraud the said association, and certain persons to the grand jurors unknown," this follows the language of the statute. Clearly it is possible to injure and defraud the association or its stockholders or other persons, by false entries in its account of profit and loss, and the charge is not repugnant or impossible. *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

21. *United States v. Norton*, 188 Fed. 256.

22. Erroneous statement of reserve in bank.—Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], provides that every president of a national bank who makes any false entry in any book or report of the association, with intent to injure or defraud it or any other person, company, or body politic or corporate, shall be guilty of a misdemeanor, etc. Held, that an indictment under such section, alleging that accused, while acting as president of a national bank, made a false entry in a report to the comptroller of currency, that the lawful money reserve in the bank, consisting of gold coin, was \$23,955, when in fact the bank only had \$21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand; the gist of the offense being the making of false entries in the report. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

23. Statement in dollars and cents.—*United States v. Potter*, 56 Fed. 83, affirmed in 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

The omission from the indictment of the dollar marks which appeared at the head of the columns in the report, whose tenor is therein set out, and in which defendant is charged with making false entries, is immaterial. *United States v. French*, 57 Fed. 382.

of the bank.²⁴

Charge by Innuendo.—If the entries alleged to be false need explanation, they may be explained by innuendo.²⁵

Intent.—An intent to injure or defraud the bank is an essential element of the offense and must be alleged.²⁶ The statute contemplates two separate intents, one to injure or defraud the association, and the other to deceive, either of which, when accompanying a forbidden act, constitutes an offense, and hence it is not necessary that an indictment alleging a false entry with intent to deceive should also charge an intent to injure or defraud the association or any other company or person.²⁷ An indictment against the president of a national bank for making false entries in the books of the bank, which charges that it was done with intent to injure and defraud the said association and certain persons to the grand jurors unknown, is sufficient, so far as concerns the allegations of intent.²⁸

Time and Place.—The use of an indictment under this section of the words "then and there" in alleging that the defendant was president or director of such bank, and that he made alleged false entries, is not uncertain or repugnant merely because in one place they may refer to the whole of a day and in another to only one instant of the day.²⁹

Request by Comptroller.—An indictment need not allege that the report was made pursuant to a request by the comptroller at a time prescribed by him.³⁰

Publication or Transmission to Comptroller.—It is not necessary to allege specifically in such indictment that the reports were transmitted to the comptroller of the currency, or that they were published.³¹

24. Negating defenses.—United States *v.* Potter, 56 Fed. 97, following United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

25. United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

26. Charge as to intent.—Under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], which makes it a criminal offense for an officer or agent of a national bank to do either of certain acts therein enumerated, "with intent in either case to injure or defraud the association," etc., such intent is an essential element of every offense therein specified, which must be charged in the indictment and proved. *McKnight v. United States*, 49 C. C. A. 594, 111 Fed. 735.

27. *Billingsley v. United States*, 101 C. C. A. 465, 178 Fed. 653.

28. United States *v.* Potter, 56 Fed. 97, following United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

29. Time and place.—United States *v.* Potter, 56 Fed. 83, affirmed in 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

30. Request by comptroller.—An indictment under Rev. St., § 5209, which provides that every president of any association who makes any false entries in any book, report, or statement of the association, with intent to injure or defraud, shall be deemed guilty of a misdemeanor, alleged that defendant, as president of a certain bank, "did knowingly, wrongfully, and unlawfully make, and cause to be made, false entries in a report or statement" of such bank, being a report of its condition at a designated time, "made to the comptroller of the currency, as required by law to be made." The report was set out in full, and the particulars in which the entries were alleged to be false were stated in detail. Held, that the indictment was sufficient, though it did not allege that the report was made pursuant to a request of the comptroller, or according to a form or at a time prescribed by him under Rev. St., § 5211, which provides therefor. *United States v. Hughitt*, 45 Fed. 47.

31. Publication or transmission to

Duty to Make Entry.—The fact that the note teller's and paying teller's books, in which it is charged the president made the false entries on which the indictments are based, are usually kept by those officers without interference by the president, does not invalidate the indictment; for the presumption that these acts were so far beyond the range of his duty as to be mere spoliations is at best one of fact, and not of law.³²

Manner of Making Entries.—An indictment for making a false entry in a report to the comptroller, need not allege that such report was made by the banking association, or that it was actually verified by the oath or affirmation of the president or cashier, or attested by the directors, as required by Rev. Stat., § 5211.³³ A count of an indictment, charging that the defendant, as president of a national banking association, caused a false entry, which is set out, to be made in the books of the bank, purporting to show that a customer had deposited a certain sum to his general credit, when in fact, as the defendant well knew, no such deposit had been made, is not insufficient, in the absence of an application for a bill of particulars, because it does not allege the manner in which the defendant caused the entry to be made.³⁴ Where an indictment against a national bank cashier for making false entries, specified with great particularity and at length the entries, the falsification of which was charged, and these entries were fully described, the indictment was not defective for indefiniteness, because it did not specify the names of the clerks or employees by whose hands the entries were in fact made.³⁵ It need not be alleged that the report was made according to a prescribed form.³⁶ It is not necessary to allege that the report in which the false entry was made was one required by law; it being sufficient that it be intended to deceive any of the persons mentioned in the statute.³⁷ The indictment need not contain an averment that the false entry was made in an account with and in the due course of business of the bank.³⁸

Entries Made by Direction.—An indictment against a sole defendant, charging that, as cashier of a national banking association, he caused and procured the making of false entries in the books of the bank, by certain clerks under his control as such cashier, with intent to defraud, sufficiently charges him with the offense as principal; the making of such

comptroller.—United States *v.* Potter, 56 Fed. 83, affirmed in 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144.

32. United States *v.* Potter, 56 Fed. 97.

33. Manner of making entries.—It is sufficient to aver that defendant made such false entry "in a certain report of the condition of the First National Bank, * * * made to the comptroller of the currency in accordance with the provisions" of Rev. St., § 5211. Cochran *v.* United States,

157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

34. McKnight *v.* United States, 38 C. C. A. 115, 97 Fed. 208.

35. Richardson *v.* United States, 181 Fed. 1.

36. United States *v.* Hughitt, 45 Fed. 47.

37. Harper *v.* United States, 7 Ind. T. 437, 104 S. W. 673.

38. United States *v.* Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

entries by his direction being the same, in legal effect, as his making them in person.³⁹

Verification and Attestation.—Counts charging false entries by the president in reports of the condition of the bank, which allege that the reports were made in conformity with the law, and then set them out by their tenor, are bad for their failure to allege specifically that the reports were verified and attested by the cashier.⁴⁰

Order of Steps Taken in Making Report.—The preparation and completion of the report; the making of the false entry therein; its verification, attestation, and delivery to the comptroller,—may be considered as simultaneous, and there is consequently no repugnance in failing to allege that any or all of these things occurred in consecutive order.⁴¹

Injury to Bank.—An indictment which does not allege any facts to show in what manner the bank could have been injured or defrauded by the false entry is insufficient.⁴²

Conspiracy.—An indictment, under Rev. St., § 5440, against two defendants, charging them with a conspiracy to commit an offense against the United States by making certain false entries in the books of a national bank of which one of the defendants was an officer, is not bad because, in stating the details of the overt act committed by the defendants, it is averred that the entries which were made in the books of the bank were made by the hand of the defendant who was not an officer thereof; it being averred that both the defendants were present and participated in the carrying out of the plan formed between them to make such entries.⁴³

Description of Person Making Entry.—In an indictment for making a false entry in a report, it is not necessary to allege that the report in which the false entry was made was one made by the association, since the penalty is affixed to any person making the false entry, and not to the association or its officers for making a false report.⁴⁴

Description of Person Deceived.—An indictment charging a bank officer with false entries with the intent to deceive any agent appointed to examine the affairs of the bank sufficiently designated the person intended to be deceived.⁴⁵ An indictment charging officers of a national bank

39. *Peters v. United States*, 36 C. A. 105, 94 Fed. 127.

40. **Verification and attestation.**—*United States v. Potter*, 56 Fed. 97.

But it seems the contrary was held in *Cochran v. United States*, 157 U. S. 286, 39 L. Ed. 704, 15 S. Ct. 628.

41. **Order of steps taken in making report.**—*United States v. French*, 57 Fed. 382; *United States v. Work*, 57 Fed. 391.

42. **Injury to bank.**—A general averment in an indictment against officers of a national bank that a false entry charged to have been made by

them in a report to the comptroller of the currency was made "with intent to injure and defraud the association" is insufficient to state an offense under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), no facts being alleged to show in what manner the bank could have been injured or defrauded thereby. *United States v. Corbett*, 162 Fed. 687.

43. *Scott v. United States*, 64 C. C. A. 631, 130 Fed. 429.

44. *Harper v. United States*, 7 Ind. T. 437, 104 S. W. 673.

45. *Billingsley v. United States*, 101 C. C. A. 465, 178 Fed. 653.

with making a false entry in a report made by them, with intent to deceive an agent appointed to examine the affairs of the association, to wit, the comptroller of the currency of the United States does not charge an offense, the comptroller not being charged with any duty to examine national banks, although he is given power to appoint agents for that purpose.⁴⁶

Description of Bank as Going Concern.—An allegation in an indictment that on a certain date a bank was a corporation duly organized and existing, with a qualified and acting president and cashier, and that on that date the cashier made a certain report to the comptroller of the currency, is a sufficient allegation that the bank was carrying on business at the time the report was made.⁴⁷

Description of Books.—The description of a book of the bank as a journal designated by a letter of the alphabet is sufficient.⁴⁸

Description of Entry or Report.—An indictment is not insufficient because its charges of false entries are unintelligible to persons not skilled as accountants, where they are intelligent as to the agent appointed by the comptroller, who, it is alleged, was the person whom the entries were intended to deceive.⁴⁹ If the entries need explanation they may be explained by innuendo.⁵⁰ In addition to the entries themselves, the indictment need set out the context only when it so modifies the entries as to be, in presumption of law, a part of them.⁵¹ The report need not be set out in full,⁵²

46. United States v. Corbett, 162 Fed. 687.

47. **Description of bank as going concern.**—Harper v. United States, 7 Ind. T. 437, 104 S. W. 673. See Jewett v. United States, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568, affirming 84 Fed. 142; Geiger v. United States, 89 C. C. A. 516, 162 Fed. 844.

48. **Description of books.**—In a prosecution of a national bank officer for making false entries, an allegation that they were made "in a book of said bank down as 'Journal K'" sufficiently alleged that the book was a book of the association within Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), prohibiting the making of false entries in any book of an association to injure or defraud it or to deceive any officer thereof or agent appointed by the comptroller to examine the bank's affairs, etc. Billingsley v. United States, 101 C. C. A. 465, 178 Fed. 653.

49. **Description of entry or report.**—It can not be objected that the false entries as set out in the counts do not of themselves have any significance, and are unintelligible without explanation. This is mere assumption.

Conceding that the entries may be unintelligible to persons not skilled as accountants, it does not follow that they are so to the agent appointed by the comptroller, who, it is alleged, was the person whom the entries were intended to deceive. United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

50. United States v. Britton, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512.

51. United States v. Potter, 56 Fed. 97.

Where the entry whose tenor is set forth contains the words, "See schedule," it is not a valid objection to the indictment that these words are not explained, for it is only necessary to set out the context when it is presumptively a part of it. United States v. French, 57 Fed. 382.

52. **Description of report.**—It is sufficient if the indictment allege the substance of the reports in question, without setting them out in full, for whether they are such reports as the law requires can be determined by the court from the allegations that they were made in response to the comptroller's order, and those touching their attestation, verification, and

nor be described with technical accuracy.⁵³

Description of Property Falsely Entered.—An indictment for making a false entry of a form as an asset of the bank is not defective for not identifying the form.⁵⁴ If it is the purpose of the government to charge the making of false entries in the books of the bank because of the receiving and crediting of checks drawn thereon by parties who had no funds there, the indictment should set forth a description of the checks, with an averment of the reasons why they were to be deemed false or valueless.⁵⁵

§ 257 (1d) Wrongfully Certifying Check.—In Language of Statute.—An indictment, in charging, in the language of the statute, that the drawer of the check had not on deposit, at the time it was certified, an amount of money equal to that specified in the check, is sufficient.⁵⁶

Duplicity.—An indictment does not charge two offenses in the same count because it alleges therein that the check was certified before the amount thereof had been entered to the credit of the drawer on the books of the bank, and also at a time when the drawer did not have on deposit an amount of money equal to the amount of the check.⁵⁷

Tenor of Instrument Set Out.—An indictment against an officer of a national bank, alleging unlawful certification of checks, was not fatally defective for failure to set out totidem verbis the written certifications, under the rule that in an indictment in federal courts it is not necessary to allege the tenor of an instrument, unless it touches the gist of the crime.⁵⁸

other like matters. *United States v. French*, 57 Fed. 382.

An indictment charging a defendant, as an officer of a national bank, with having made a false statement in a report made to the comptroller, is not required to set out such report in full, but is sufficient if it identifies the report by its date, and sets out the particular statement claimed to be false. *Dorsey v. United States*, 41 C. C. A. 652, 101 Fed. 746.

53. An indictment under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), charging defendant as cashier of a national bank with making a false entry in a report with intent to deceive an officer of the association, need not describe the report with technical accuracy, and an averment of date when made, and that it was a report to the comptroller of the currency showing resources and liabilities on a certain date, is sufficient to authorize presumption that it was a report made by the association under § 5211. Judgment, 7 Ind. T. 437, 104 S. W. 673, reversed. *Harper v. United States*, 95 C. C. A. 555, 170 Fed. 385.

54. Description of form.—A count in an indictment for violating The National Banking Act alleged that

accused, as president of the bank, made an entry in the bank's daily journal of the words and figures following: "Other Real Estate, A. Barton Farm, \$3,350.00;" that the entry indicated that the south half of a specified quarter section of land was a certain eighty-acre tract known as the "Barton Farm," and was an asset of the bank in the sum of \$3,350.00; that the entry so made was false, in that the same described land was not then and there an asset of the bank of the value of \$3,350.00, or of any sum whatsoever. Held, that such count was not defective as failing to charge that the A. Barton farm was known or described in accordance with the description recited, or was identified therewith, or because it was not charged that the A. Barton farm was not an asset of the bank. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

55. *Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904.

56. Wrongfully certifying check.—*United States v. Potter*, 56 Fed. 83.

57. Duplicity.—*United States v. Potter*, 56 Fed. 83.

58. *United States v. Heinze*, 161 Fed. 425.

Description of Bank.—An indictment charging that the defendant was the president of a certain national banking association is not defective for failure to allege the bank was a national banking association organized under the laws of the United States.⁵⁹

Delivery of Check.—The indictment need not allege delivery of the check by the bank after certification.⁶⁰

Absence of Credit or Deposit.—Some counts of the indictment simply charged that the checks were certified contrary to the statute, and others that after certification they were authenticated by the paying teller. Inasmuch as the counts allege the certification as an accomplished act, it will not be presumed that the authentication was any essential part of it; and hence it is not necessary to allege the absence of the required credit or deposit at the time the authentication was made.⁶¹

§ 257 (1e) Aiding and Abetting.—Counts in an indictment which charge the defendant with procuring and counseling the false entry before the act are valid, for such acts are covered by the clause of the section extending the penalty to any one who abets an officer or agent in the acts prohibited.⁶²

Intent.—An indictment charging an officer of a national bank with making false entries with intent to defraud, and charging another person with aiding and abetting him therein “in manner and form aforesaid,” is defective in failing to charge, as to the latter, an intent to defraud.⁶³ Where a count of an indictment is for the aiding and abetting of an officer in a false entry, and the false entry by the principal as well, it is enough to charge each with the intent to deceive the comptroller’s agent specified in the statute, although the principal is charged with intent to injure and defraud the bank as well.⁶⁴

59. Description of bank.—Rev. St. U. S., § 5208 (U. S. Comp. St. 1901, p. 3497), declares that it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn on the association, unless, etc.; and § 5209 declares that every president, director, cashier, teller, clerk, or agent of “any association, who embezzles,” etc. Held, that an indictment, charging that defendant, being then and there the cashier of a certain “national banking association,” to wit, etc., was not fatally defective for failure to allege that the national banking association specified was a national banking association organized under the laws of the United States. *Geiger v. United States*, 89 C. C. A. 516, 162 Fed. 844.

60. Delivery of check.—An indictment under Act July 12, 1882, c. 290, § 13, amendatory of Rev. St., § 5208,

which makes it a misdemeanor for any officer of a national bank to “certify any check” drawn by one who did not then have on deposit sufficient money to meet the same, need not allege delivery of the check by the bank after the certification. *Potter v. United States*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144, affirming 56 Fed. 83.

61. Absence of credit or deposit.—*United States v. Potter*, 56 Fed. 83.

62. Aiding and abetting.—*United States v. French*, 57 Fed. 382; *United States v. Work*, 57 Fed. 391.

63. Charge as to intent.—*United States v. Berry*, 85 Fed. 208.

64. Where it was contended that a count was defective, because the principal offender was charged with having made the false entries with the intent to injure and defraud the bank, and also with the intent to deceive any agent appointed and any agent

Knowledge That of Principal Officer of Bank.—An indictment charging the president of the bank with aiding and abetting one who is alleged to be cashier to misapply the funds of the bank need not charge that the president knew that such person was cashier.⁶⁵ An indictment which avers that the defendant knowingly aided the principal alleged to have been president of the bank, sufficiently charges that the defendant knew the principal was such president.⁶⁶

Guilt of Principal.—An indictment seeking to charge third persons with aiding and abetting a director of a national bank in misapplying the funds of the bank, must state facts showing a misapplication of money of the bank committed by the director.⁶⁷ A count with ample allegations of fraudulent intent and purpose, which distinctly charges embezzlement by the cashier of a national bank on many different days and times between certain dates, for the benefit and gain of the defendant, by a pretended discount of paper contrary to the express direction of the directors, whereby defendant obtained a sum of its money and funds, and converted the same to his own use, is sufficient.⁶⁸

Manner of Aiding or Abetting.—An indictment of persons for aiding and abetting a president of a national bank in misapplying its funds and making false entries in its books, with intent to defraud it, need not specifically set out the act or acts by which the aiding and abetting were consummated.⁶⁹

Where Defendant Described as Officer.—Though the counts in an in-

or agents who might thereafter be appointed by the comptroller of the currency to examine the affairs of the association, whilst the aiders and abettors were charged only with having had an intent to deceive the agent appointed by the comptroller, the answer is self-evident. It was wholly immaterial that the principal offender should have had several intents, provided the principal and the aider and abettor were both actuated by the criminal intent specified in the statute. The alleged additional intent on the part of the principal offender might well have been treated as surplusage. *Coffin v. United States*, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

65. Knowledge that principal officer.—*United States v. Northway*, 120 U. S. 327, 30 L. Ed. 664, 7 S. Ct. 580.

66. An indictment of H. and other persons for violation of Rev. St., § 5209, averred that "said H., then and there being president" of a certain national bank, "by virtue of his said office as president aforesaid," "misapplied the funds" with intent to defraud, etc., and that such other persons did unlawfully, feloniously,

"knowingly," and with intent to defraud, aid and abet the "said H. as aforesaid." Held, that the indictment averred that the aiders and abettors knew that H. was president of the bank at the time it is averred the acts were committed. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

67. Charge as to guilt of principal.—*United States v. Warner*, 26 Fed. 616.

68. This indictment is good on a motion in arrest, in view of § 1024 [U. S. Comp. St. 1901, p. 720], declaring the form of an indictment to be immaterial, provided the substance is there; the word "embezzlement," as used therein, showing a misapplication by the cashier of the property in his official possession, within the meaning of the statute, and the punishment prescribed being not so much for each offense, but so much for every officer or agent who commits such offenses, and every person who aids or abets, irrespective of the number of times. *United States v. McClure*, 107 Fed. 268.

69. *Coffin v. United States*, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

dictment, under this section, for aiding and abetting the cashier in making such false entries, describe defendant as being then and there a director of the bank in question, it can not be held that they charge him with aiding and abetting in his official capacity.⁷⁰

Misapplication by Drawing Checks.—An indictment charging that the defendant knowingly, willfully, and unlawfully, with intent to injure and defraud a national bank, aided and abetted the cashier in misapplying the funds of the bank, by drawing checks on the bank when he had no funds on deposit to meet the same, which checks were paid by the cashier, sufficiently charges an offense.⁷¹

Reference to Former Part of Charge.—Where every element of the offense of aiding or abetting is set out in an earlier part of the indictment, there is no necessity of repeating such element when a particular act is described.⁷²

§ 257 (1f) Quashing Indictment.—Where there is a doubt whether an indictment charges the offense of making a false entry in a report with intent to deceive an agent appointed to examine the affairs of a national bank, the indictment should not be quashed, but the doubt be left to be solved on a motion in arrest of judgment.⁷³

§ 257 (1g) Construction of Indictment.—An allegation that the defendant made a certain entry in a certain report will not be construed to mean that the entry was made after the report was completed and was in fact an alteration.⁷⁴

70. Where defendant described as officer.—United States *v.* French, 57 Fed. 382; United States *v.* Work, 57 Fed. 391.

71. United States *v.* Hillegrass, 176 Fed. 444.

72. Reference to former part of charge.—Where a count charging the president with aiding and abetting the cashier in misapplying funds, etc., charges defendant with willfully misappropriating the money and credits of the bank for his own use, benefit, and advantage, and with intent to defraud the bank, the object of the subsequent language of the count is rather to identify the property misapplied than to charge a distinct offense, although the allegation of a willful misappropriation, with intent to defraud, is repeated. The count charges, as ingredients of the crime, first, that the defendant knowingly, willfully, unlawfully and fraudulently aided and abetted the cashier; second, in willfully misappropriating the funds and credits of the bank; third, that he did this for his own use and benefit; fourth, with intent to defraud the

bank; fifth, the credit misapplied is then described as a note of one Nettleton, which was then overdue and unpaid; sixth, the manner of the misapplication is then set forth as consisting in the surrender and delivery of the same by the cashier to the defendant, without receiving any part of the sum represented by the note. It is sufficient. Every element of the offense being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied is described. Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

73. United States *v.* Bartow, 10 Fed. 874, 20 Blatchf. 349.

74. Construction of indictment.—Rev. St., § 5209, provides that every president or other officer or agent of a national banking association, who makes any false entry in any book, report, or statement of the association, with intent to injure or defraud the association, or to deceive any officer of the association, or any agent appointed to examine its affairs, and every person who, with like intent,

§ 257 (2) Issues, Proof and Variance—§ 257 (2a) Issues.—In determining whether the omission of an item from the list of liabilities of directors was made with intent to deceive, the jury may consider whether the defendant's action was caused by the prior receipt of a letter from the comptroller calling the attention of the bank officials to the excessive amount of the loans made to the directors and demanding a reduction thereof.⁷⁵ In determining the defendant's guilty intent, the jury should consider his relation to the bank as an officer and a shareholder, assistance given the bank by him in its embarrassment by the loan of his individual money, and whether he had any motive for making false entries, together with circumstances that may have induced him to do so, such as an examination by the officers of the bank's affairs at the time the entries were made.⁷⁶

Conviction of Lesser Offense on Charge of Greater.—Under an indictment charging one, as president and agent of a national banking association, with willfully misapplying the assets of the association, the accused may be convicted of misapplying assets in his actual possession, since the misapplication is a broader term, and includes the offense of embezzlement.⁷⁷

§ 257 (2b) Proof.—The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid.⁷⁸ Where an indictment against a national bank officer charges him personally with illegally certifying certain checks, it is necessary for the government, in order to sustain such charge, to prove that the individuals who actually executed the certification indorsement were but the physical instruments of the defendant and acted in accordance with his orders.⁷⁹

General and Special Counts.—Under an indictment for the willful and criminal misapplication of funds of a national bank by its officer, containing several special counts charging particular acts of misapplication, to sustain a

aids or abets any such officer or agent in the violation of this section, shall be imprisoned, etc. Held, that an allegation, in an indictment under this section, that defendant "did make a certain false entry in a certain report of the said association," will not be construed to mean that the entry was made after the report was completed, and was in fact an alteration. *United States v. French*, 57 Fed. 382.

75. Issues.—A bank director is personally liable on paper made to the bank by a firm of which he is a member, and, in making a report of the condition of the bank to the comptroller, the amount of such paper should be entered under the heading of "Liabilities of Directors (Individual and Firm) as Payers;" and, in determining whether the omission of such an item from this heading was made

with intent to deceive, the jury may consider whether defendant's action in this respect was caused by the prior receipt of a letter from the comptroller calling the attention of the bank officials to the excessive amount of the loans made to the directors, and demanding immediate reduction thereof. *United States v. Graves*, 53 Fed. 634.

76. *United States v. Allen*, 47 Fed. 696.

77. Conviction of lesser offense on charge of greater.—Judgment, *United States v. Jewett*, 84 Fed. 142, affirmed. *Jewett v. United States*, 41 C. C. A. 88, 100 Fed. 832, 53 L. R. A. 568.

78. Proof.—*Richardson v. United States*, 181 Fed. 1.

79. *United States v. Heinze*, 161 Fed. 425.

verdict on the specific counts the particular acts must be proven as alleged; but the proof of other acts than alleged may be included in the verdict on the general count.⁸⁰

Surplus Charge Need Not Be Proved.—In an indictment against an officer of a national bank for embezzlement, an averment that the money embezzled was lawful legal tender money of the United States is surplusage, and need not be proved.⁸¹

Want of Consent of Other Officers.—An averment, in an indictment charging an officer of a national bank with embezzlement by paying out money on a note which he knew to be worthless, with intent to injure and defraud the bank, that the transaction was without the knowledge or consent of the directors or the discount committee, need not be specifically proved, where the transaction which the evidence tends to prove was one to which it can not be presumed the directors or committee would consent; but in such case, if consent is relied on, it must be proved as matter of defense, and by evidence showing that it was given in good faith and with knowledge of the facts.⁸²

Presumptions and Burden of Proof.—The defendant's knowledge of the falsity of a report and his intent to defraud the bank may be presumed from proof of his having made the entry.⁸³ Such presumption is not nec-

80. *United States v. Harper*, 33 Fed. 471.

81. *Porter v. United States*, 33 C. A. 652, 91 Fed. 494.

82. *McKnight v. United States*, 54 C. C. A. 358, 115 Fed. 972.

83. **Presumptions.**—If a president or cashier makes a false entry in a report of the condition of the bank to the comptroller of the currency, the jury are authorized to presume, from the false entry itself, in the absence of any explanation or of any other testimony, that he knew it to be false. This presumption results from the fact that it is the duty of the officer who verifies the report to know the condition of the bank, and, if the report is false, there is a *prima facie* presumption that he knew it. *United States v. Allis*, 73 Fed. 165.

Where entries by the accused in the books of a national bank were false and capable of deceiving the comptroller's agents, defendant's intent to deceive and defraud may be inferred from the making of the entries, under the rule that every person is presumed to intend the natural and probable result of his acts knowingly done, and that an unlawful act implies an unlawful intent. *United States v. Wilson*, 176 Fed. 806.

Presumption from falsity of entry.—A finding as to the intent with

which false entries were made in the books of a national bank by an officer of the bank may be based on legitimate inferences from the facts shown, and where, on the trial of a defendant for making such entries with intent to deceive the bank examiner, it is found that the entries were false; that they were made, or caused to be made, by defendant; and that their necessary effect was to deceive the bank examiner—it may be inferred that they were made with such intent. *Peters v. United States*, 36 C. C. A. 105, 94 Fed. 127.

Presumption of responsibility for natural consequences of act.—The following instruction, in a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, was unobjectionable, being but a broader statement of the principle that every man is presumed to know the natural and probable consequences of his own acts: "As I have said before, the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge; and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid

essarily negated by proof that he had another motive, and that his chief one, in making it appear to the comptroller that the excessive loans had been reduced, if in fact he knew that what he did would injure and defraud the bank.⁸⁴ In a prosecution of a national bank officer for making alleged false entries, a plea of not guilty places on the government the burden of proving that defendant, within the district and within three years prior to the finding of the indictment, knowingly and intentionally made one or more false entries in the books of the bank with intent to deceive or defraud any agent of the government charged with the duty of supervising the transactions of the bank, or inspecting its books or accounts.⁸⁵

§ 257 (2c) Variance.—An averment, in an indictment for misapplication of moneys, funds, and credit by using the same to discount an unsecured note that such note was made and drawn by a person designated by his full first and surnames is supported by proof that it was made by such person, although it is not shown whether it was signed with his full first name or by his initials.⁸⁶ The failure of the indictment to state the names

you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his act. I have said that is what is presumed in every case a man means." *Cook v. United States*, 87 C. C. A. 99, 159 Fed. 919.

Presumption in absence of explanation.—In the prosecution of defendants, under Rev. St., § 5209 (U. S. Comp. St. 1901, p. 3497), charged as officers with having made false entries in the books of a national bank and in reports to the comptroller with intent to injure and defraud the bank and deceive its officers and the examiner, it was not error to charge the jury that, if they found that such false entries were made, they were authorized to presume therefrom, in the absence of any explanation, that defendants knew them to be false, and that, if the natural and probable consequence of such entries was to defraud or deceive, they might presume, in the absence of explanation, that such was defendant's intention. *Morse v. United States*, 98 C. C. A. 321, 174 Fed. 539.

Presumption not conclusive.—Proof that entries were false to the knowledge of the officer making or directing them, that they were in the usual course to be carried into the report to the comptroller, and were of a character calculated to deceive the comptroller or his agent as to the condition of the bank, raised a presumption that

they were made by defendant with intent to deceive the comptroller or his agent, though such presumption was not conclusive. *United States v. Youtsey*, 91 Fed. 864, reversed on merits in *Youtsey v. United States*, 38 C. C. A. 562, 97 Fed. 937.

In a prosecution, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], against an officer or clerk of a national bank for embezzlement or the making of false entries, with intent to injure or defraud the bank or to deceive, if the acts charged are proved the intent must be inferred therefrom; and, while such inference or presumption is not conclusive, it throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy the jury, beyond a reasonable doubt, that there was no such guilty intent in the transaction, though, if the use of the words "beyond a reasonable doubt" was technically erroneous, such use was not prejudicial to the case, when the charge is viewed as a whole and in connection with the uncontradicted evidence of the acts which constituted the prima facie case. *United States v. German*, 115 Fed. 987.

84. *United States v. Youtsey*, 91 Fed. 864, reversed on merits in *Youtsey v. United States*, 38 C. C. A. 562, 97 Fed. 937.

85. Burden of proof.—*United States v. Wilson*, 176 Fed. 806

86. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

of persons alleged as persons to the grand jury unknown does not constitute a fatal variance.⁸⁷

As to Amount.—A charge of the misapplication of a certain sum of money is proved by evidence of the crediting of a larger amount.⁸⁸ Where an indictment charged that a bank president received and placed to the credit of a company a bill of exchange of a certain number of pounds sterling, and the check offered to show the payment of such money was for dollars, there was no variance, where the sum misapplied was credited by taking the bill of exchange, and such sum was paid out on the check.⁸⁹

As to Time.—An averment in an indictment by mistake of a date different from that proved does not amount to a fatal variance.⁹⁰

§ 257 (3) Evidence—§ 257 (3a) Admissibility—§ 257 (3aa)

As to Misapplication.—Letters of Directors.—A letter written by certain of the directors of the bank to the comptroller of the currency, after the misappropriation, was inadmissible either as showing the state of mind of the directors after the offense, or a ratification of the misappropriation.⁹¹

Commercial Rating of Defendant.—Evidence of the commercial rating of a president of a bank at the time of an alleged conversion by him of its funds, by purchasing for the bank, without authority, and having placed to his credit, worthless bonds, which he had guaranteed is irrelevant.⁹²

Insolvency of Bank.—As evidence that overdrafts on a bank by its president were made with intent to abstract or misapply its funds it may be shown that at the time of the overdrafts it was hopelessly insolvent, that this was due to its assets being notes of wholly irresponsible persons, and that

87. Names of persons alleged to be unknown.—An averment in the indictment that the misapplication of funds by the accused was for the benefit of himself "and other persons to the grand jurors aforesaid unknown," did not entitle the defendant to have the question whether the grand jury did in fact know, or should have known, the names of such other persons, submitted to the jury for the purpose of establishing a variance, since the failure to state such names, even if they might have been stated, could not have been prejudicial to defendant. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

88. Variance as to amount.—Where a count in an indictment charges an officer of a national bank with having misapplied \$25,000 of the money of the bank, "by causing the said sum of \$25,000 to be credited to G. & W. on the books of the bank," etc., and the evidence shows a credit by a single entry of \$105,000, \$25,000 of which the jury found was a misapplication, held not a material variance, and that he

may be convicted on that count. *United States v. Fish*, 24 Fed. 585.

89. Coffin v. United States, 156 U. S. 432, 39 L. Ed. 481, 15 S. Ct. 394.

90. Variance as to time.—The indictment averred that the note was dated on the 8th day of December, 1894, and was due and payable "on the 11th day of April, A. D. 1894." The proof corresponded with the indictment as to date, but showed that the note was due on the 11th day of April, 1895. Held, that the mistake in the indictment was one so obvious that it could not have misled the accused to his prejudice, and that the variance was not fatal. The note not being the subject-matter of the offense, and the averment of the date of its maturity one which was immaterial and unnecessary to its identification, the allegation as to the day of maturity might be rejected as surplusage. *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 916.

91. Dickinson v. United States, 86 C. C. A. 625, 159 Fed. 801.

92. Agnew v. United States, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

these notes had been used by the president in connivance with the cashier, who was a director, and another director, to give him a fictitious credit.⁹³

Purpose of Misapplications.—On an indictment for the misapplication of bank funds by its officer, the defendant offered to show that certain misapplications were made for the purpose of trying to secure the bank against losses through former misapplications. Such evidence is irrelevant, as the defendant could not condone former offenses by subsequent efforts to make good the loss.⁹⁴

Resignation of Other Officer.—Upon the trial of a national bank president for misapplication of its funds, it was proper to ask the cashier on cross-examination why he resigned as cashier shortly after the commission of the misapplications charged. Because he was the officer next in rank to the president and had testified on the defendant's behalf, his personal action was relevant on cross-examination as testing his testimony in chief. If the voluntary resignation had no connection with the president's conduct, the answer could not be injurious, and besides these answers were practically immaterial.⁹⁵

Testimony of Cashier of Another Bank.—On a charge of the conversion of the bank's bonds, by purchasing for the bank, without authority, and having placed to the defendant's credit, worthless bonds, which he had guaranteed, the testimony of the cashier of another bank as to whether, at the time of the transaction, he considered the defendant's guaranty for such an amount good, is inadmissible.⁹⁶

Aiding and Abetting.—On the prosecution of a defendant, charged with aiding and abetting the cashier of a national bank to misapply the funds of the bank, the misapplication of such funds by the cashier with criminal intent is a material issue, and any competent evidence relevant to such issue is admissible.⁹⁷ In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank as collateral for a loan, defendant having used the certificate as collateral on a note he discounted, defended on the ground defendant did not know of the bank's interest in the certificate and was innocent of any purpose to aid and abet in abstracting it, the prosecution could show that the bank's minute book disclosed no record of the

93. **Insolvency of bank.**—Breese v. United States, 45 C. C. A. 535, 106 Fed. 680, judgment reversed on rehearing in 48 C. C. A. 36, 108 Fed. 804, on another point.

94. United States v. Harper, 33 Fed. 471.

95. **Resignation of other officer.**—On the trial of the president of a national bank for criminal misapplication of its funds, the cashier at the time of the alleged criminal misapplication having testified fully, on behalf of the defendant, as to its financial condition and standing, was asked if he knew de-

fendant's financial rating at that time, and was not allowed to answer. The ruling was correct, as the point of inquiry was defendant's actual financial condition or what he knew or must be held to have known or actually and with reason believed that it was, and his commercial rating was not relevant. Agnew v. United States, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

96. Agnew v. United States, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

97. United States v. Hillegrass, 176 Fed. 444.

directors sanctioning the use of the certificate.⁹⁸

§ 257 (3ab) As to Abstraction.—In a prosecution for aiding and abetting the officers of a national bank to willfully abstract the funds of the bank by means of certain overdrafts, evidence that prior to the making of such overdrafts it was agreed that the bank should furnish funds for the operations of certain corporations in which the accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the overdrafts, and that at the time of the advances the value of the corporation's property was about ten times the amount of the overdrafts is admissible to show absence of criminal intent.⁹⁹

§ 257 (3ac) As to False Entries.—Books, Statements and Letters.—In view of the provisions of the National Banking Act requiring the books of a national bank to be truthfully kept, by making it an offense to make false entries therein, proof that books are those of a national bank in which the record of its daily business was kept raises a presumption that they were properly kept, which renders them admissible in evidence without further proof, when offered by the government in a criminal suit against an officer of the bank for making false reports.¹ It is competent to show the state of the defendant's account, not merely at the very day the false entry was made, but also before and after that date, for the purpose of throwing light on the intent with which it was made.² On the trial of a defendant charged as an officer or agent of a national bank, with having made false entries in its books in the accounts showing the indebtedness to it of other banks, periodical statements taken from the bank's files and purporting to have been rendered to it by such other banks, and which are shown to have been under the defendant's charge, are admissible in evidence.³ The fact that a letter written by the comptroller of the currency to the president of a national bank, which formed a part of the official correspondence of the bank, was taken by some individual from a box marked as containing private papers of the president, and was afterwards given to the officers of the United States, does not render such letter inadmissible in evidence on the part of the government in a prosecution of the president for a violation of the national banking laws.⁴

^{98.} *Cook v. United States*, 87 C. C. A. 99, 159 Fed. 919.

^{99.} **As to abstraction.**—The advances were more than \$300,000 while the overdrafts were only \$30,872.24. *United States v. Steinman*, 172 Fed. 913.

^{1.} **Books of bank in evidence.**—*Bacon v. United States*, 38 C. C. A. 37, 97 Fed. 35.

^{2.} *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91, 15 S. Ct. 36.

^{3.} **Periodical statements.**—The state-

ments may also be identified by employees of such other banks as having been made under their direction and duly sent by them, and their correctness verified by reference to the books of such banks, which are in evidence and used in connection with such books for convenience of reference, as evidence of the true state of the account between the two banks. *Goll v. United States*, 80 C. C. A. 642, 151 Fed. 412.

^{4.} *Bacon v. United States*, 38 C. C. A. 37, 97 Fed. 35.

Evidence of Banking Custom.—Evidence to the effect that when a bank rediscounts notes it indorses them, and that a bank held certain notes which it rediscounted, is sufficient to establish the fact, when such notes have become lost or destroyed, that they were indorsed by the bank, and to render admissible testimony of false entries in the books of the bank respecting such notes, made by direction of a defendant charged with having, as cashier, caused such entries to be made for the purpose of concealing the liability of the bank on account of such indorsement.⁵

Testimony of Bookkeeper.—Where a bookkeeper testifies to making false entries by the defendant's direction, the defendant is not prejudiced by the refusal of the court to permit such witness to testify on cross-examination whether he did not put into a report prepared by him in September, in the absence of the defendant from the state, a false entry made in December, and charged in a count on which the defendant was acquitted.⁶

Testimony of Witness Who Has Examined Books.—A witness may, from an examination of the bank's book, testify to the condition of the defendant's account.⁷ The testimony of a bank examiner who is a skilled accountant is admissible to show false entries, but it must consist of knowledge derived from his investigation of the books, and not of conclusions based partly upon statements of officers and clerks of the bank.⁸

Exclusion of Evidence Wrongfully Admitted.—The error, if any, in admitting evidence of the defendant's making a false report of the bank's condition to the comptroller of the currency, covering the time of the false entries, is cured by an instruction to disregard such evidence, except the fact that the comptroller had called for such report, and that it had been prepared and transmitted.⁹

§ 257 (3ad) As to Unlawfully Certifying Check.—Upon the trial of a national bank officer for official misconduct, evidence as to his reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank.¹⁰

§ 257 (3b) Weight and Sufficiency.—Where a certificate of the comptroller of the currency recited that a certain bank had complied with

5. *Dorsey v. United States*, 41 C. C. A. 652, 101 Fed. 746.

6. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91, 15 S. Ct. 36.

7. **Testimony of witness who has examined books.**—On trial of a national bank president on an indictment containing twenty-five counts, charging false entries in the books of the bank, running from February to December, 1892, with intent to injure, defraud, or deceive, in violation of Rev. St., § 5209, it was not error to permit a witness, from an examination of the bank's books, to testify to the condition of

defendant's private account during such time, though he was convicted only on one count, which charged the making of the entry in February, 1892. *Allis v. United States*, 155 U. S. 117, 39 L. Ed. 91, 15 S. Ct. 36.

8. *United States v. Allen*, 47 Fed. 696.

9. *United States v. Folsom*, 7 N. Mex. 532, 38 Pac. 70.

10. **As to unlawfully certifying check.**—*Spurr v. United States*, 31 C. C. A. 202, 87 Fed. 701, reversed in 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812, on another point.

all the provisions of the act of Congress authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until a certain such certificate is conclusive evidence, in a prosecution of the president of the bank for violating the National Bank Act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter.¹¹

As to Misapplication.—Evidence that the cashier of a national bank overdrew his account, by means of checks which were not charged to his account, but carried in the drawer as cash and afterwards taken up by his note, all without the knowledge or consent of the board, is sufficient to warrant his conviction by a jury of misapplication of the bank's funds.¹² In a prosecution of national bank officers and alleged aiders and abettors for misapplying the bank's funds, evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, is insufficient to sustain a conviction.¹³

Abstraction.—The conviction of a defendant charged with having, as a director and agent of a national bank, unlawfully abstracted money of the bank, is sufficiently supported by evidence which warranted a finding that defendant procured the making of two notes, by an employee who was wholly irresponsible, without consideration, and, having access to the funds and books of the bank, appropriated that sum of the bank's money to his own use, leaving the notes in exchange therefor.¹⁴

False Entries.—Where false entries were made by the officers of a national bank to overcome complaints by the comptroller in order that the bank examiners and the comptroller might be deceived and misled thereby, proof of such false entries is sufficient to sustain a finding that they were made with intent to injure and defraud the bank, and this though they represented the condition of the bank to be more favorable than it was.¹⁵ Where the indictment charges the defendant with intent to defraud the bank by making false entries by several different acts, it is sufficient to prove such intent as to any one act.¹⁶

11. *Clement v. United States*, 79 C. C. A. 243, 149 Fed. 305.

12. *Brock v. United States*, 79 C. C. A. 121, 149 Fed. 173.

13. *Prettyman v. United States*, 103 C. C. A. 384, 180 Fed. 30.

14. *Dorsey v. United States*, 41 C. C. A. 652, 101 Fed. 746.

15. *Richardson v. United States*, 181 Fed. 1.

16. **Proof of one of several acts.**—Where a national bank cashier was indicted for making false entries, and also for indirectly participating in the making thereof, in that he caused and procured them to be made, proof of

either of such charges was sufficient after verdict to sustain a conviction, even though the other was not proved. *Richardson v. United States*, 181 Fed. 1.

Under an indictment based upon Rev. St., § 5209, charging an officer of a national bank with having made false entries in its books with the intent to deceive the officers and directors of the bank and any agent appointed by the comptroller to examine the affairs of the bank, and to injure and defraud the association, it is sufficient to prove the wrongful intent in either particular charged. *McKnight v. United States*, 38 C. C. A. 115, 97 Fed. 208.

§ 257 (4) Trial—§ 257 (4a) Jurisdiction.—Of Federal Courts.

—The United States circuit courts have exclusive jurisdiction of the prosecution of officers of national banks for the commission of acts, made criminal by the National Bank Act, but which are not offenses at common law.¹⁷ Where the alleged criminal acts of a bank president in defrauding his bank were begun in one state, but were completed in another, it was therefore within the jurisdiction of the court for the latter state to have cognizance of the prosecution.¹⁸

Of State Courts—To Punish for Embezzlement.—A state court has no jurisdiction to try the cashier of a national bank for embezzling the bank's funds, where the state statutes do not apply to national banks; the offense not being indictable at common law.¹⁹

To Punish for Forgery.—Although an act constituting forgery under a state law is committed in violation of the National Bank Act and solely for that purpose, the jurisdiction of the state courts to try indictments for forgery is not ousted by the fact that federal courts are given exclusive jurisdiction of offenses against the United States.²⁰

17. Jurisdiction of federal courts.—United States *v.* Buskey, 38 Fed. 99; Commonwealth *v.* Ketner, 92 Pa. 372, 1 Browne, Nat. Bank Cas. 404, 1 Ky. L. Rep. 213, 37 Leg. Int. 339, 37 Am. Rep. 692.

Exclusive jurisdiction.—The offense of making false entries in the books of a national bank, for which an officer of the bank is liable to punishment under Rev. St., § 5209, is exclusively cognizable by the federal courts. In re Eno, 54 Fed. 669.

The United States circuit court has exclusive jurisdiction of the prosecution of an officer of a national bank for embezzling the funds of such bank, under Rev. St., § 5209, declaring that an officer of a national bank who embezzles its funds shall be punished by imprisonment, and under the judiciary act declaring that the jurisdiction of the circuit court of the United States shall be exclusive in the trial of all crimes or offenses against the laws of the United States, except where it is otherwise provided. United States *v.* Buskey, 38 Fed. 99.

18. Offense begun in one state and completed in another.—Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923.

In view of the fact that the power to draw the checks which constituted the alleged misappropriation, did not inhere in the functions of the president, and in consequence of the absence of proof as to a course of business implying the power, as also in consideration of the fact that the January checks

were not drawn at the banking establishment, but in another city, the proof was adequate to justify the court in refusing to take the case from the jury, and in leaving it to them to determine whether there was such informality in the checks as made a subsequent ratification, obtained in the state where the prosecution was instituted by the fraudulent representation of the defendant, one of the efficient causes for the absorption of the credit resulting from the debit of the checks, so as to defer the completion of the offense to the time of such ratification and give the courts of the state where it was made jurisdiction. Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923.

19. Jurisdiction of state courts.—United States *v.* Buskey, 38 Fed. 99; Commonwealth *v.* Ketner, 92 Pa. 372, 1 Browne Nat. Bank Cas. 404, 1 Ky. L. Rep. 213, 37 Leg. Int. 339, 37 Am. Rep. 692.

20 To punish for forgery.—Though an act constituting forgery under Code N. C. 1883, § 1029, was committed solely for the purpose of deceiving the examiner appointed under the United States national banking laws, and therefore violates Rev. St., § 5209, the jurisdiction of the state courts to try the indictment for the forgery is not ousted by the fact that by § 711, the federal courts are given exclusive jurisdiction of offenses against the United States. Cross *v.* State, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.

Forgery of a note by the president

To Punish for Receiving Deposit after Insolvency.—A state court has jurisdiction of an indictment against an officer of a national bank for receiving a deposit when the bank is insolvent, this not being made an offense by the laws of the United States.²¹

To Punish Accessory.—Since the passage of the National Bank Act, making the embezzlement of funds of a national bank by one of its officers a misdemeanor indictable in the federal courts, an accessory to an embezzlement by an officer of a national bank can not be prosecuted for a felony in the state courts, though he is not indictable in the federal courts.²²

§ 257 (4b) Instructions.—A charge as to an offense against the National Bank Act must be applicable to the evidence.²³ Where an indictment contained a number of counts charging the defendant, as an officer of a national bank, with having caused false entries to be made in the books, a general instruction that there was not sufficient evidence to show that such entries were made by defendant, and directing a verdict of acquittal on such counts, was properly refused, where there was evidence sufficient to go to the jury upon any one of the counts.²⁴

Testimony of Defendant.—Where the defendant testifies that certain overdrafts were by agreement treated as loans it is proper to charge permitting the jury to consider the testimony of the defendant on the question

and cashier of a bank, with intent to deceive the United States bank examiner, by entering it upon the books of the bank as assets, is within the jurisdiction of the state court, although the federal court has exclusive jurisdiction to determine the falsity of the entries and punish the makers. *State v. White*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53, affirmed in 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.

Where act constitutes forgery under state law.—It is no objection to the jurisdiction of the state courts that the same act constitutes forgery under the state law, as well as a violation of the national banking law, and that the offender is subject to punishment for both crimes. *Cross v. State*, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47.

Upon trial of defendant for forgery it appeared that a draft was drawn by one national bank upon another, that defendant was a bookkeeper in the bank, and without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. Held, that the punishment of the crime was within the jurisdiction of the state courts, notwithstanding the provision of Rev. St., § 5209, that every president, clerk, or agent of any national bank who, without authority

from the directors, draws any order or bill of exchange, shall be deemed guilty of a misdemeanor, and Act of congress March 3, 1875, which provides that the circuit courts of the United States shall have exclusive cognizance of all causes and offenses cognizable under the authority of the United States, except as otherwise provided by law. *Hoke v. People*, 122 Ill. 511, 13 N. E. 823.

To punish for making false entries.—A teller of a national bank may be convicted in a state court upon an indictment charging him with fraudulently making false entries, reports, and statements with intent to injure and defraud the bank. The offense thus charged was forgery at common law. *Commonwealth v. Lueberg*, 94 Pa. 85, 1 Browne Nat. Bank Cas. 408, 37 Leg. Int. 399. 1 Ky. L. Rep. 300.

21. Receiving deposit after insolvency.—*State v. Bardwell*, 72 Miss. 535, 18 So. 377. But see *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288, in which such a statute of a state was declared unconstitutional.

22. Commonwealth v. Felton, 101 Mass. 204.

23. Instructions.—*May v. United States*, 157 Fed. 1

24. Dorsey v. United States, 41 C. C. A. 652, 101 Fed. 746.

of intent.²⁵ It is not reversible error to refuse to charge that, if defendant used the proceeds of a check belonging to the bank, and which he had caused to be placed to his credit, in the payment of a debt of the bank, the jury must find that he did not fraudulently embezzle the amount, especially where defendant's explanation of the transaction is unsatisfactory.²⁶

Request for Charge.—The court does not err in refusing a requested charge where it gives another substantially the same.²⁷

Charge as to Provisions of National Bank Act.—In a prosecution of a bank officer for certifying checks drawn on the bank by a person who did not have a sufficient deposit at the time to meet such checks, the court read to the jury the provision of Revised Statutes, § 5208, but, although requested by the defendant's counsel, did not read the provisions of the Act of July 12, 1882, under which the prosecution was brought, and which makes the criminal offense consist in the willful violation of Revised Statutes, § 5208.²⁸

25. Testimony of defendant.—When an officer of a national bank, indicted under Rev. St., § 5209, for making false entries, in a report of the condition of such bank, in respect to amounts of overdrafts and of loans and discounts, has testified that certain overdrafts, in respect to which the depositors had consulted the bank officers, and obtained permission to overdraw, were treated by the officers and directors of the bank as temporary loans, and were reported by him among loans, and not among overdrafts, in the belief that they might properly be so reported, it is error to charge the jury that the defendant was required by law to place under the heading "Overdrafts," in the report, all sums drawn out by depositors in excess of their deposits, and that the transfer of any such sums to the heading "Loans and Discounts" was the making of a false entry; since such charge takes from the jury the right to consider, upon the question of intent, the explanation given by the defendant, while, if they believed such explanation, and that the defendant acted in good faith, the entries were not false, within the meaning of the statute. *Mr. Justice Harlan dissenting. Graves v. United States*, 165 U. S. 323, 41 L. Ed. 732, 17 S. Ct. 393.

26. Agnew v. United States, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

27. Request for charge.—Upon an issue as to whether a defendant was guilty, under the statute, of having made false statements as to overdrafts in a report to the comptroller made by him as an officer of a national bank, where the defendant claimed that a part of such overdrafts bore interest, and were reported by him, in good

faith, under the head of "Loans and Discounts," it was not reversible error to refuse a special instruction requested, stating that the defendant could not be found guilty on such charge if the jury found that the entries in the reports were made by him in good faith, and with the honest belief that they were correctly made, when in its general charge, not excepted to, the court stated that the defendant could not be convicted on such charge unless the entries were "knowingly and intentionally false when made," and were made with intent to defraud or deceive, and that if the jury found that the defendant "honestly believed, and had good reason to believe," that the entries were correct, he would not be guilty. Such charge, taken together, was substantially that requested, and the difference in the language so slight that it can not be supposed to have been regarded by the jury. *Dorsey v. United States*, 41 C. C. A. 652, 101 Fed. 746.

Instructions given and refused on the trial of a defendant charged as an officer of a national bank, under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], with misappropriation of its funds and with making false entries in its books considered, and the charge as given held correct and to cover fairly such of the requested instructions refused as were proper and applicable to the evidence. *Goll v. United States*, 80 C. C. A. 642, 151 Fed. 412.

28. Charging provision of National Bank Act.—In a prosecution of the president of a national bank for certifying checks drawn on the bank by a firm which did not have a sufficient deposit at the time to meet such checks,

Charge as to State Law.—On a trial for willful misapplication of the funds of a national bank, where it appeared that one of the defendants had drawn checks in excess of his deposits, which were paid, it is reversible error for the court to call the jury's attention to a state statute making it a misdemeanor to draw a check on a bank, where there are no funds to meet it.²⁹

Charge as to Intent.—In a prosecution for embezzlement it is error for the court to refuse to charge that the jury could not convict unless the acts of embezzlement were committed with intent to defraud the bank, although the court defined the offense as the fraudulent appropriation by the defendant of the funds of the bank to his own use.³⁰ It is error to refuse to charge as to the insolvency of the persons to whom the defendant is alleged to have loaned and thereby misapplied the funds of the bank, where the question of insolvency bears no intent.³¹ Evidence that the defendant gave his written guaranty for funds misapplied, which, by reason of his insolvency, was worthless, is not sufficient to require a charge that there was no intent to defraud the bank.³²

the defense was that defendant acted in good faith, and in reliance on the statements of the cashier and bookkeeper that the drawers had a sufficient deposit. After several hours deliberation the jury returned into court, and asked for "the law as to the certification of checks when no money appeared to the credit of the drawer." The court read to them the provision of Rev. St., § 5208, which makes it unlawful to certify checks under such circumstances, but, although requested by defendant's counsel, did not read the provisions of the Act of July 12, 1882 (22 Stat. 162, c. 290), under which the prosecution was brought, and which makes the criminal offense consist in "willfully" violating Rev. St., § 5208. Held, that such action of the court was error, as tending to mislead the jury, and was not cured by a statement that what the court then said was to be taken in connection with the previous charge, which charge correctly stated the necessity of finding that defendant acted willfully, with knowledge of the facts, or that he purposely refrained from inquiry, to warrant a conviction. Judgment 31 C. C. A. 202, 87 Fed. 701, reversed. *Spurr v. United States*, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

²⁹ *Dow v. United States*, 27 C. C. A. 140, 82 Fed. 904.

³⁰ **Charge as to intent.**—Where the court, in a prosecution under Rev. St., § 5209 [U. S. Comp. St. 1901, p. 3497], for embezzlement by an officer of a national bank, refused to charge, as re-

quested, that the defendant could not be convicted unless the jury found that the acts of embezzlement were committed with intent to injure or defraud the bank, as charged in the indictment, but charged that the averment of such intent was surplusage, such action was reversible error, notwithstanding it defined embezzlement in the charge as the fraudulent appropriation by defendant of the funds of the bank to his own use. *McKnight v. United States*, 49 C. C. A. 594, 111 Fed. 735.

³¹ Under an indictment charging an officer of a national bank with embezzlement of its funds by causing money of the bank to be paid to persons known by him to be insolvent, for the purpose of bribery, and with intent to defraud the bank—such payment being made under the guise of a loan, for which such persons executed their note to the bank—the insolvency of such persons is an important consideration, going to the question of intent; and an instruction which, in effect, tells the jury that the question of their insolvency may be ignored, is misleading. *McKnight v. United States*, 54 C. C. A. 358, 115 Fed. 972.

³² The evidence showed that defendant, president of a national bank, without authority of the directors, purchased \$20,000 bonds, of little value, at a great discount, and had them placed in the assets of the bank and to his credit at face value, giving his written guaranty for the principal and interest, which, by reason of his financial condition, was almost worthless. Held,

Charge as to Burden of Proof and Presumptions.—In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge.³³ A charge to the effect that, if the defendant, a bank president, purchased bonds which were worthless, or of but little value, placed them among the assets of the bank at a greatly exaggerated value, and had such exaggerated value placed to his own credit, these facts create a presumption of an intent to defraud the bank, which throws the burden of proof upon the defendant, and that evidence to overcome the presumption must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent, is not error, where the character of such evidence and the nature of a reasonable doubt are sufficiently explained in other portions of the charge.³⁴ A charge that a false entry on the books of a national bank alone gives rise to the presumption that it was made with criminal intent and knowledge of its falsity is cured by a statement elsewhere in the charge that a false entry must be known to be false and designed to deceive.³⁵

Charge as to Aiding and Abetting.—In a prosecution for aiding and abetting the willful misapplication of the funds of a national bank by its officers by overdrafts, an instruction that an arrangement by which the cashier and president of a banking institution allow its funds to be taken out is not a justification, since the funds of a national banking institution can only be taken out by the action of its board of directors, and that if the paying of the checks constituting the overdrafts, or any of them, either the money of the bank was removed from its resources, or its capital reduced, or its charter endangered, any one of such things would be sufficient to warrant the jury in finding a misapplication with intent to injure the bank, is erroneous.³⁶

Cure of a Defective Charge.—On a prosecution of a bank officer for making a false entry in a report to deceive the other bank officers and the comptroller, an erroneous instruction that, if accused made the report for the purpose of deceiving the other bank officers and the comptroller, he should be convicted, was cured by another stating that conviction could not be had unless the evidence showed that accused committed the act under the conditions and at the time and place alleged in the indictment,

that it was not error to refuse to charge that, from the guaranty, the jury might find that there was no intent to defraud the bank. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

33. Charge as to burden of proof and presumptions.—*Spurr v. United States*, 31 C. C. A. 202, 87 Fed. 701, reversed in 174 U. S. 728, 43 L. Ed. 1150, 19 S.

Ct. 812, because of the refusal of another charge.

34. *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

35. *United States v. Peters*, 87 Fed. 984.

36. *United States v. Steinman*, 172 Fed. 913.

setting them forth.³⁷ A charge as to intent to injure the bank or to deceive an examining agent is not misleading where the jury is subsequently charged specifically as to intent.³⁸

§ 257 (4c) Questions of Law and Fact.—The question of the existence of a criminal intent in a prosecution of a bank officer is for the jury.³⁹ It is for the jury to say whether a false entry was made by another under the direction of the defendant.⁴⁰ The sufficiency of the defense to a prosecution for making a false report as to overdrafts that the overdrafts drew interest and that the defendant in good faith believed they should not be reported as overdrafts is for the jury.⁴¹

§ 258. Banking Powers.—The United States statutes relative to

37. Cure of defective charge.—Harper *v.* United States, 7 Ind. T. 437, 104 W. 673.

38. In a prosecution of an officer of a national bank under Rev. St., § 5269 (U. S. Comp. St. 1901, p. 3497), for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the section, stating that a misapplication of funds, in order to constitute an offense, must have been with intent to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed pursuant to law to examine the affairs of the bank," was not misleading, where the jury were subsequently charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown. Morse *v.* United States, 98 C. C. A. 321, 174 Fed. 539.

39. Questions of law and fact.—The question whether the criminal intent averred is properly inferable from the facts proved is for the jury. United States *v.* Hillegrass, 176 Fed. 444.

In a prosecution of an officer of a national bank for misapplying its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, the question of intent is one for the jury under proper instructions. Walsh *v.* United States, 98 C. C. A. 461, 174 Fed. 615.

In a prosecution of defendant K. for aiding and abetting the officers of a national bank in the misappropriation of the bank's funds by means of checks and drafts of a hosiery company, in which such defendants were interested, whether such appropriation was intended to injure and defraud the bank, held for the jury. Prettyman

v. United States, 103 C. C. A. 384, 180 Fed. 30.

40. Entry made under direction.—It appeared in evidence that defendant summoned a bank clerk to his house, and directed him to make the books of the bank show a cash reserve of \$50,000 more than it actually had, because of an expected demand for a statement from the comptroller. Defendant specified certain entries which he wished to have made, but left \$12,000 unprovided for. The clerk added the \$12,000 by a false entry, showing a deposit by a depositor of something more than that amount the day before. Held, that a false entry made by a clerk under defendant's direction was made by the defendant, within the indictment, and that it was for the jury to say, as to the \$12,000, whether the clerk's making it was within the direction of the defendant. United States *v.* Youtsey, 91 Fed. 864, reversed on merits in Youtsey *v.* United States, 38 C. C. A. 562, 97 Fed. 937.

41. Report of overdrafts.—Where a defendant was charged with having, as an officer of a national bank, made false statements in reports to the comptroller, by understating the amount of overdrafts on the bank, and the government proved that the overdrafts existing at the time of the reports in fact largely exceeded the amounts reported, which evidence was met by the defendant by evidence tending to show that a large part of such overdrafts bore interest, and by the claim that he did not consider it his duty to report as overdrafts accounts on which interest was being paid, the sufficiency of such defense, both as to the facts and the question of good faith, was a matter for determination by the jury. Dorsey *v.* United States, 41 C. C. A. 652, 101 Fed. 746.

national banks constitute the authority of such banks, and they can not rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established.⁴² National banks are expressly given the right to exercise all the usual powers incidental to carrying on the business of banking.⁴³ "The business of bank-

42. Powers of national banks measured by banking act.—*Bullard v. Bank* (U. S.), 18 Wall. 589, 21 L. Ed. 923; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306; *Bailey v. Farmers' Nat. Bank*, 97 Ill. App. 66; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Lynch v. Merchants Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

Such an association may make contracts, sue and be sued, and complain and defend in any court of law or equity as fully as natural persons. They may also elect directors; and the board of directors may appoint a president, vice president, cashier, and other officers, and define their duties. 13 Stat. 101; Rev. Stat., § 5136. *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695.

A bank organized under the National Bank Act is authorized to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which its general business shall be conducted, and the privileges granted by law exercised and enjoyed. *Easton v. Iowa*, 188 U. S. 220, 47 L. Ed. 452, 23 S. Ct. 288; *Merchants' Nat. Bank v. State Nat. Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

The charter of incorporation of a bank not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. *Pacific R.*

Removal Cases, 115 U. S. 1, 29 L. Ed. 319, 5 S. Ct. 1113.

As to banks generally, see ante, "Banking Franchises and Powers, and Their Exercise in General," §§ 86-101.

43. Powers incidental to banking.—*First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496; *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. Ed. 907; *Easton v. Iowa*, 188 U. S. 220, 230, 47 L. Ed. 452, 23 S. Ct. 288; *Merchants' Nat. Bank v. State Nat. Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

Banks may do, in this behalf, whatever natural persons could do under like circumstances. But to some extent, it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. Stat., § 5137; 13 Stat. 107, § 28) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (§ 5201; 13 Stat. 110, § 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for, and in payment of, debts previously contracted in good faith, but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320.

Section 5136 of the Revised Statutes of the United States provides

ing" is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; receiving deposits, buying and selling exchange, coin and bullion, lending money on personal security, and obtaining, issuing, and circulating notes; and to those specified powers and those necessary to the exercise of the powers expressed the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation.⁴⁴ Of these powers, under the statutes providing for their creation, every one must take notice.⁴⁵ A national bank has power to sell or assign a judgment in its favor,⁴⁶ to accept a deposit to be held by it as collateral security for the performance of a contract between the depositor and another,⁴⁷ to assume and pay the liabilities of another bank,⁴⁸ to agree to repay money borrowed,⁴⁹ to agree to pay taxes on its stock transferred to it,⁵⁰ to buy and sell coin,⁵¹ to purchase

that national banks shall have power: "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the banking business; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

In construing this statute the state courts must yield to the interpretation of such laws by the courts of the United States. *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782, affirmed, no op.

44. *Merchants Nat. Bank v. Armstrong*, 65 Fed. 932; *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 10 Am. St. Rep. 879.

45. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

46. *To sell or assign judgment.*—*Emory v. Joice*, 70 Mo. 537.

47. *Bushnell v. Chautauqua Nat. Bank*, 10 Hun 378, affirmed in 74 N. Y. 290.

48. *To pay debts of another bank.*—A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not ultra vires, but is within its powers conferred by statute to conduct a general banking business. *Schofield v. State*

Nat. Bank, 38 C. C. A. 179, 97 Fed. 282.

49. *Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 482, 109 Fed. 421.

50. *To pay taxes on stock transferred to bank.*—An agreement by a national bank to pay taxes on its stock transferred to it, and assessed at the time against the sellers, in consideration of being allowed to retain unpaid dividends and surplus, is not illegal, although the taxes are not properly assessed. *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784.

51. *To purchase and sell coin.*—The National Currency Act of 1864, authorizing the banks created under it to buy and sell coin, a bank having coin in pledge may sell and assign its special property; in which case the assignee will become vested with the legal rights of the assignor. *Merchants' Nat. Bank v. State Nat. Bank (U. S.)*, 10 Wall. 604, 19 L. Ed. 1008.

The clause of the National Currency Act of 1864, which directs that "the usual business" of the banks created under it shall be transacted "at an office or banking house in the place specified in its organization certificate," does not prevent the purchase of coin by one bank at the banking house of another. *Merchants' Nat. Bank v. State Nat. Bank (U. S.)*, 10 Wall. 604, 19 L. Ed. 1008.

Rights of bank under purchase for brokers.—One national bank purchased from another gold certificates under an agreement with certain brokers that the latter might receive the same amount of gold from the purchasing bank, at any time thereafter, by paying the amount advanced, compensation for trouble, and interest at six per cent. The certificates were paid

notes,⁵² to agree to honor a draft upon a customer,⁵³ to make loans and discounts⁵⁴ and charge interest thereon,⁵⁵ to act as surety,⁵⁶ to receive deposits,⁵⁷ to buy and sell exchange,⁵⁸ to issue and circulate notes,⁵⁹ to make collections,⁶⁰ to sue and be sued⁶¹ to employ an attorney to prosecute or defend suits,⁶² and to adopt measures for doing business.⁶³ A national bank has no power to contract to recover stolen property for a special depositor,⁶⁴ to procure insurance,⁶⁵ to make a donation to a manufacturing company to keep it from moving from a city,⁶⁶ to certify an instrument not a commercial check,⁶⁷ or to become a member of a partnership.⁶⁸

for, received and deposited with other assets of like character, without any special mark or anything to distinguish them from the rest, and upon its face it was a simple sale of the gold at a premium. It was held that the bank can not be regarded as holding the certificates in pledge, but it took the title and the entire property and the broker's rights were merely contractual. *Merchants' Nat. Bank v. State Nat. Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008, reaffirmed in *United States v. State Nat. Bank*, 96 U. S. 30, 24 L. Ed. 647, 13 S. Ct. 523.

52. To purchase notes.—See post, "Purchase and Discount of Negotiable Paper," § 260 (6).

53. To agree to honor draft.—It is not ultra vires for a national bank to promise to honor a draft upon a patron. *Farmers', etc., Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136.

54. To make loans and discounts.—See post, "Loans and Discounts," § 269.

55. To charge interest on loans.—See post, "Interest or Rate of Discount and Usury," § 270.

56. To act as surety.—See post, "Guaranty or Indemnity," § 260 (4).

57. To receive depositors.—See post, "Deposits in General," § 263.

58. To buy and sell exchange.—See post, "Dealing in Exchange, Money and Securities," § 271.

59. To issue and circulate notes.—See post, "Circulating Notes," § 272.

60. To make collections.—See post, "Collections," § 268.

61. To sue and be sued.—See post, "Capacity to Sue and Be Sued," § 274.

62. To employ attorney.—Under its authority to sue and be sued, complain and defend in any court of law or equity, as fully as natural persons, a national bank has power to employ attorneys to prosecute or defend suits. *Guthrie Nat. Bank v. Earl*, 2 Okl. 617, 39 Pac. 391.

63. To adopt measures for doing business.—The power to adopt reasonable and appropriate measures for carrying on its authorized business is necessarily implied. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320.

64. To recover stolen property.—The stockholders of a national bank are not bound by an agreement of the directors with a depositor to undertake to recover stolen bonds, though the directors might be individually liable. *Wylie v. Northampton Nat. Bank*, 15 Fed. 428, 64 How. Prac. 456.

65. To procure insurance.—An agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, is ultra vires. *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

66. Prima facie, a national bank has no right to make a donation to keep a manufacturing company from moving its plant from the city. *McCrory v. Chambers*, 48 Ill. App. 445.

67. To certify instrument not check.—A national bank has no power to certify an instrument by which the drawers agreed to pay their surety any amount the surety might be legally required to pay by virtue of such suretyship, not exceeding a specified amount, the check to be void in the absence of such liability; such instrument not being a commercial check, drawn in the ordinary course of banking business. *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782.

68. To become partner.—A national bank, established under act of Congress, can not be a member of a partnership, or become liable as a partner. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613, reversing 68 O. St. 160, 68 N. E. 1004, on another point. *Guerinck v. Alcott*, 66 O. St. 94, 63 N. E. 714.

Where a national bank joins as a partner with certain persons in forming a joint stock company to operate

To Borrow Money or Incur Indebtedness.—The power to borrow money or to give notes is not expressly given by the National Banking Act. The business of a bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.⁶⁹ The Revised Statutes provide

a mill, it can not be denied a recovery of money loaned to the company, on the ground that it had no power to become a partner in such milling business. *Cameron v. First Nat. Bank*, 4 Tex. Civ. App. 309, 23 S. W. 334, affirmed in 93 Tex. 656, no op.

The want of authority of a national bank to become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold, is a valid defense to an action against it founded upon its liability for the partnership debts. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

A customer of a national bank, being largely indebted to it, and being in failing circumstances, and being the owner of nine shares in a partnership consisting of forty shares, each evidenced by a certificate transferable on the books of the firm, transferred his nine shares to the bank to secure payment of his indebtedness; the bank becoming the owner of such shares. Held, the bank could not become a partner, nor a part owner in severalty of the property then owned by the partnership, and liable for 9/40 of the debts and expenses in purchasing, improving, and disposing of the firm property. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613, reversing 68 O. St. 160, 68 N. E. 1004.

Partnership certificate.—It does not follow that because the interest in a partnership is represented by a paper certificate in form more or less resembling a certificate of stock in a corporation and transferable like it, a national bank can take the partnership certificate to the same extent that it could take the stock. Whatever its right to accept same as security in

some form, it can not take an absolute transfer thereof to itself. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

Recovery of money loaned.—But a national bank, having joined with others as a partner, can recover money loaned the firm. *Cameron v. First Nat. Bank* (Tex. Civ. App.), 34 S. W. 178, affirming 23 S. W. 334.

Overruled case.—A national bank is liable in a civil action for fraud perpetrated under the guise of a partnership agreement, though it had no power to make such an agreement. *Pronger v. Old Nat. Bank*, 20 Wash. 618, 56 Pac. 391.

69. To borrow money or incur indebtedness.—First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

"There is nothing in the acts of congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing." *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

A national bank has power to borrow money on call for the purposes of its business. *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339; *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556. Affirmed *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

May borrow to meet demands.—A national bank, finding itself embarrassed, with a large amount of assets, much in excess of its obligations, yet without the cash to make payment of those which are due and urgent, can borrow to meet those pressing demands. It is not borrowing money to engage in new business. It simply exchanges one creditor for others. There

that no national bank shall be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in, except on circulation, deposits, special funds, or declared dividends.⁷⁰ This does not prohibit a national bank from incurring indebtedness, up to the amount of its paid-up capital, for any purpose within its powers, though its circulation, deposits, special funds, and declared dividends exceed the amount of its paid-up capital.⁷¹ The execution of a bond by a national bank to secure county deposits does not constitute an increase of the bank's liability.⁷² A debt incurred by a national bank, for which it receives and retains the consideration, is not void because incurred in violation of this statute, and is enforceable.⁷³ A national bank may make a binding oral agreement to repay money it borrows, and to pay notes it procures to be discounted.⁷⁴

Determining Question of Power.—The original demand having been transferred to a national bank, the question whether the bank could lawfully take the collateral security will not be determined in an action to foreclose the mortgage to which the bank is not made a party.⁷⁵

§ 259. Property and Conveyances—§ 259 (1) Right to Acquire Property or Interest Therein—§ 259 (1a) Real Property—§ 259 (1aa) In General.—In the absence of affirmative evidence of some contravention of the National Currency Act, a national bank may lawfully purchase, hold, and convey real estate.⁷⁶ An objection that a corporation or

may be wisdom in consolidating all its debts into the hands of one person. At least such a consolidation can not be pronounced beyond its powers. When time is obtained by the new indebtedness (in this case a year) it gives the borrowing bank and its officers and stockholders time to consider and determine the wisdom of attempting a further prosecution of business. In the case of an individual it would be a legitimate and often a wise transaction. It is not in terms prohibited by The National Banking Act. *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498, is very clearly in point. *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495.

Borrow to lend again.—A national bank may borrow money for the purpose of lending the same again to others with a view to making a profit. *National Bank v. National Bank*, Fed. Cas. No. 18,310.

70. Limitation as to amount.—Rev. St. U. S., § 5202.

71. How amount estimated.—*Weber v. Spokane Nat. Bank*, 12 C. C. A. 93, 64 Fed. 208, overruling 50 Fed. 735.

72. Board v. Munson, 157 Mich. 505, 122 N. W. 117.

73. Contract enforceable.—*Weber v. Spokane Nat. Bank*, 12 C. C. A. 93, 64 Fed. 208, overruling 50 Fed. 735.

A national bank which uses in its business money obtained by its vice president as a loan to it from another national bank can not escape liability to account therefor upon the ground that the loan was not negotiated by it or by its direction, or that it could not itself have legally borrowed the money. *Decree Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirmed. *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

74. Hanover Nat. Bank v. First Nat. Bank, 48 C. C. A. 482, 109 Fed. 421.

75. Briggs v. Hannowald, 35 Mich. 474.

76. Power to take real property.—*First Nat. Bank v. Kidd*, 20 Minn. 234, Gil. 212.

But it has been held in a recent case national banks have no power to acquire and hold title to real estate, except for the purposes expressed in or necessarily implied from their charters. *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000. This decision is abstractly correct, but the want of power of the bank can be questioned

ganized under the national banking act has no capacity to purchase land can only be raised by the federal government.⁷⁷

Section 5136, of the Revised Statutes, does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed.⁷⁸

Section 5137 provides that a national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgment, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, of the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.⁷⁹ The object of the restrictions is obviously threefold. It is to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law.⁸⁰

Effect of State Statute.—Mortgages void under a state insolvency law are not freed from its operation because owned by a national bank.⁸¹

Necessary for Transaction of Business.—A national bank empowered by charter to provide necessary real estate for its business may make a contract to prevent the erection of buildings on adjacent land so as to

by the United States only. Therefore, a bank can take property not authorized by its charter, and the transaction is valid between the parties.

77. *De Witt County Nat. Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 86; *Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Wherry v. Hale*, 77 Mo. 20.

78. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

79. **Time bank can hold.**—Rev. Stats., § 5137.

80. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

81. **Effect of state statute.**—*Witters v. Sowles*, 32 Fed. 758.

Rev. St. U. S., § 5137, which provides that a national banking association may hold such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted," and such "as shall be conveyed to it in satisfaction of debts pre-

viously contracted in the course of its dealings," does not validate a conveyance to a national bank which is prohibited by the statute of the state relating to insolvency. *Chipman v. McClellan*, 159 Mass. 363, 34 N. E. 379.

Pub. St. Mass. c. 157, §§ 96, 98, which invalidate transfers of property made with a view to a preference by any one insolvent or in contemplation of insolvency, where this fact is known to the transferee, in no way conflicts with Rev. St. U. S., § 5137, which grants to a national bank the right to hold such real estate as "shall be mortgaged to it in good faith by way of security for debts previously contracted," and such as "shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings;" nor does it impair any function of national banks as instrumentalities of the federal government. *McClellan v. Chipman*, 164 U. S. 347, 41 L. Ed. 461, 17 S. Ct. 85.

secure light and air for its banking house.⁸²

In Excess of Debt.—A national bank may acquire real estate in satisfaction of a debt due it, paying, if necessary, the difference between the amount of the debt and the value of the real estate.⁸³

To Purchase Other Incumbrance.—Where a national bank has lawfully acquired an interest in real property, in satisfaction of a debt, it may purchase other undivided interests therein or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage.⁸⁴ A national bank has power to covenant to pay on demand a lien on land acquired by it.⁸⁵ It may lawfully agree with others holding conflicting mortgages on the same property, to represent all in an action to enforce the security, their respective rights in the proceeds to be subsequently determined, where such action was deemed best for its own interests, and, when vested with title to the other mortgages by proper assignments, its right to maintain the suit can not be questioned by the defendant on the ground that its agreement was *ultra vires*.⁸⁶

To Purchase under Decree or Judgment.—The National Banking Act authorizes national banks to hold and convey such real estate as they shall purchase at sales under decrees and judgments.⁸⁷

To Purchase for Speculation.—An owner of mortgaged property can not sue to enjoin sale under foreclosure, on the ground that defendant na-

82. Necessary for transaction of business.—*First Presbyterian Church v. National State Bank*, 57 N. J. L. 27, 29 Atl. 320, affirmed in 58 N. J. L. 406, 36 Atl. 1129.

83. In excess of debt.—*Libby v. Union Nat. Bank*, 99 Ill. 622.

Under St. U. S. 1864, c. 106, § 28, authorizing a national bank to purchase real estate "to secure debts," etc., such corporation may hold real estate actually purchased for security of the debt, although in excess thereof. *Upton v. National Bank*, 120 Mass. 153.

84. To purchase other incumbrance.—*Cockrill v. Abeles*, 30 C. C. A. 223, 86 Fed. 505.

Purchase of prior lien.—A national bank which lawfully holds a second mortgage may buy in the first one to protect its interest. *Holmes v. Boyd*, 90 Ind. 332.

At foreclosure sale under another mortgage.—A national bank, holding a second mortgage given to secure a debt, may purchase, under Rev. St. U. S., § 5137, the land at a foreclosure sale under the first mortgage. *Heath v. Second Nat. Bank*, 70 Ind. 106.

85. Mutual Life Ins. Co. v. Yates County Nat. Bank, 35 App. Div. 218, 54 N. Y. S. 743.

86. Morris v. Third Nat. Bank, 73 C. A. 211, 142 Fed. 25.

87. To purchase under decree or judgment.—*Wherry v. Hale*, 77 Mo. 20.

It is no objection to a national bank's holding real estate for one of the authorized purposes that it acquired it by assignment of a certificate of purchase at a sheriff's sale on execution, and by a subsequent deed from the sheriff. *Turner v. First Nat. Bank*, 78 Ind. 19.

Real estate mortgaged to bank.—*Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213.

A national bank that has loaned money on timber land may, to protect itself and collect the debt, purchase the land at foreclosure sale, and cut and sell the timber. *Roebbling v. First Nat. Bank*, 30 Fed. 744.

Other real estate to secure same debt.—Rev. St., § 5137, authorizes a national bank to purchase such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted. Held, that where a national bank, in order to secure the same debt, purchases other real estate not mortgaged to it, it does not affect the title to the land it was authorized to purchase. *Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213.

tional bank had taken as assignment of the decree as a speculation, in contravention of the National Banking Act.⁸⁸

To Hold in Trust.—The acceptance of a deed in trust by a national bank, though ultra vires, does not render the conveyance void, but only voidable. The United States alone can interfere.⁸⁹

Presumption of Violation of Statute.—Where the issue is not raised by the pleadings, the court will not presume that the mortgage sought to be foreclosed by a national bank was taken or held by a bank in contravention of the national currency act, or that the same was invalid.⁹⁰

Time Bank Can Hold Property.—Where a national bank, in a state, where it is provided by statute that if the bank should hold real estate not necessary to the carrying on of its business for more than five years such property should escheat, held real estate for such time, the property was subject to escheat under the state law.⁹¹

§ 259 (1ab) As Security for Debt—§ 259 (1aba) Where Taken Directly.—For Pre-Existing Debt.—The act of congress provides that a national bank may purchase, hold, and convey real estate mortgaged to it in good faith by way of security for debts previously contracted.⁹² A mort-

88. *Buchanan v. Saunders County Nat. Bank*, 4 Neb. (Unof.) 410, 94 N. W. 631.

89. **To hold in trust.**—*Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000.

The United States alone can object to the want of authority of a national bank, under Rev. St. U. S., § 5137 (U. S. Comp. St. 1901, p. 3460), to accept a conveyance of real property to be held in trust. *Kerfoot v. Farmers', etc., Bank*, 218 U. S. 281, 54 L. Ed. 1042, 31 S. Ct. 14, affirming decree *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000.

90. *First Nat. Bank v. Kidd*, 20 Minn. 234, Gil. 212.

91. **Time bank can hold property.**—Ky. St., § 567 (Russell's St., § 2153), providing that no corporation engaged in banking shall hold or own real estate, except such as may be necessary and proper for carrying on its legitimate business for a period longer than five years under penalty of escheat, was not in conflict with Rev. St. U. S., § 5137 (U. S. Comp. St. 1901, p. 3460), authorizing national banks to hold real estate for five years for specified purposes; and hence, where a national bank in the state held real estate, not necessary to its business, for more than five years, the property was subject to escheat under the state law; it appearing that it would not impair the efficiency of the bank. *First Nat. Bank v.*

Commonwealth, 143 Ky. 816, 137 S. W. 518, 34 L. R. A., N. S., 54.

92. **As security for pre-existing debt.**—Rev. St., § 5137; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317, 10 S. Ct. 93, and cases cited; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 552, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Mapes v. Scott*, 94 Ill. 379; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Farmers' Nat. Bank v. Robinson*, 59 Kan. 777, 53 Pac. 762; *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058; *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017; *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000; *George v. Somerville*, 153 Mo. 7, 54 S. W. 491; *Thornton v. National Exch. Bank*, 71 Mo. 221; *First Nat. Bank v. Grosshans*, 61 Neb. 575, 85 N. W. 542; *Union Nat. Bank v. Touzalin Improv. Co.*, 1 Neb. 116, 95 N. W. 489; *Richards v. Kountze*, 4 Neb. 200; *Graham v. National Bank*, 32 N. J. Eq. 804; *Slade v. Squier*, 133 App. Div. 666, 118 N. Y. S. 278; *Oldham v. First Nat. Bank*, 85 N. C. 240; *National Banking Act*, June 3, 1864, § 28 (U. S. Rev. Stat. 1878, § 5137);

gage given to a national bank by way of security for an indebtedness previously contracted, and evidenced by new notes of the mortgagor, is valid.⁹³ Where a bank takes an assignment of notes secured by a mortgage it will not be presumed, in the absence of evidence, that the debt for which the assignment was taken was incurred in *præsent*.⁹⁴

For Present or Future Debt.—The supreme court of the United States, while conceding that the law does, by clear implication, prohibit national banks to make loans on real estate, has held, nevertheless, that the risk of ouster and dissolution is the only penalty contemplated by congress for violating the prohibition, which penalty can be invoked by the United States alone, and the bank is not disabled from enforcing such loans by judicial process at the plea of the debtor.⁹⁵ The decision of this question

Farmers', etc., Nat. Bank v. Wallace, 45 O. St. 152, 12 N. E. 439; *Allen v. First Nat. Bank*, 23 O. St. 97; *Shinkle v. First Nat. Bank*, 22 O. St. 516; *Merchants' Nat. Bank v. Wehrmann*, 68 O. St. 160, 68 N. E. 1004; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Taylor v. Davidson* (Tex. Civ. App.), 120 S. W. 1018; *Wroten v. Armat*, 72 Va. (31 Gratt.) 228.

The defendant owed a large sum of money to a national bank. To partially secure the payment thereof, he gave a mortgage to the bank on some property owned by him in Chicago, Ill. There was a prior lien of \$2,000 on the Chicago property, which the defendant agreed to pay. Five hundred dollars of the same became due, and the bank, in order to save and protect its own lien on said Chicago property, and at the request of the defendant, paid said sum of \$500, and then took the note and mortgage now sued on for that amount on property situated in Crawford county, Kan. Held, that the taking of the last-mentioned mortgage was not a violation of the national banking law, and that the mortgage was valid. *Ornn v. Merchants' Nat. Bank*, 16 Kan. 341.

What is existing debt.—Where a national bank loans money to enable the borrower to purchase land at a judicial sale, a subsequent conveyance of such land to the bank is in discharge of a debt previously contracted under Rev. St. U. S., § 5137. *Turner v. First Nat. Bank*, 78 Ind. 19.

Grain elevator.—A national bank, having taken as security for a pre-existing debt a conveyance of a warehouse or elevator for storing grain, placed parties in charge, to continue the business as its agents. A., who held a receipt from former custodians of the elevator for a certain quantity

of grain stored therein, mixed, as was customary, with other grain of the same quality, made a demand on the bank therefor, and, delivery of the same being refused, brought suit for its conversion. It appeared that when the bank took possession of the elevator there was enough grain therein of the kind described in A.'s receipt to cover all receipts for such grain then outstanding. Held, that the bank had power to take the elevator as security for its debt. *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630.

93. New note given.—*Farmers', etc., Nat. Bank v. Wallace*, 45 O. St. 152, 12 N. E. 439.

When several debts due to a national bank are consolidated into one, and a new note is given, the bank is not acting *ultra vires* in taking a mortgage on real estate to secure such note. *Oldham v. First Nat. Bank*, 85 N. C. 240.

Agreement for periodical renewals.—The power of a national bank to take a mortgage of real estate executed in good faith, to secure pre-existing indebtedness, is not affected by the fact that at the same time an old note representing the debt is taken up, and a new one given, with an agreement for periodical renewals. *Howard Nat. Bank v. Loomis*, 51 Vt. 349.

94. Richards v. Kountze, 4 Neb. 200.

95. For present or future debt.—*Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, reversing 62 Mo. 329; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213; *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed.

by the supreme court overruled a number of decisions in the state and lower federal courts, which by a weight of authority had decided a mortgage to

981; *Camp v. Land*, 122 Cal. 167, 54 Pac. 839; *Warner v. De Witt County Nat. Bank*, 4 Ill. App. 305; *Libby v. Union Nat. Bank*, 99 Ill. 622; *Mapes v. Scott*, 94 Ill. 379; *First Nat. Bank v. Elmore*, 52 Iowa 541, 3 N. W. 547; *State Nat. Bank v. Flathers*, 45 La. Ann. 75, 12 So. 243, 40 Am. St. 216; *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058; *Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5; *Thornton v. National Exch. Bank*, 71 Mo. 221; *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000; *Riesterer v. Horton Land, etc., Co.*, 160 Mo. 141, 61 S. W. 238; *Wherry v. Hale*, 77 Mo. 20; *First Nat. Bank v. Grosshans*, 61 Neb. 575, 85 N. W. 542; *Scofield v. State Nat. Bank*, 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412; *Graham v. National Bank*, 32 N. J. Eq. 804; *Atlantic State Bank v. Savcry*, 82 N. Y. 291; *Simons v. First Nat. Bank*, 93 N. Y. 269; *Oldham v. First Nat. Bank*, 85 N. C. 240; *Winton v. Little*, 94 Pa. 64; *Farmers' Deposit Nat. Bank v. Western, etc., Fuel Co.*, 215 Pa. 115, 64 Atl. 374, 114 Am. St. Rep. 949; *Stone v. Brown*, 54 Tex. 330; *Wroten v. Armat*, 72 Va. (31 Gratt.) 228.

"The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person can not, directly or indirectly, usurp this function of the government." *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. See, also, *Gold Min. Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648.

Valid between parties.—A mortgage of real estate, securing a contemporaneous loan of money advanced by a national bank, is valid inter partes. *Myers v. Campbell*, 64 N. J. L. 186, 44 Atl. 863.

Attachment creditor can not impeach.—A national bank to which a corporation was indebted purchased the funding bonds of the corporation secured by a trust deed of its real estate to the amount of its claims and more, and to conform in appearance with Rev. St. U. S., § 5137 [U. S. Comp. St. 1901, p. 3460], authorizing a national bank to take a mortgage only to recover debts previously contracted, and to make it appear that it held the notes of two corporations instead of bonds secured by mortgage, it took the note of another corporation, which was not indebted to it, indorsed by the one issuing the bonds, for the same amount as the bonds. Held, that the bonds and mortgage were not held as collateral security for such note, and, as such subordinate to defendant's lien on the property under an attachment subsequent to the trust deed, since the note did not represent any debt, and defendant could not usurp the province of the government, and punish the bank for its evasion of the act of congress. *Riesterer v. Horton Land, etc., Co.*, 160 Mo. 141, 61 S. W. 238.

Existing and future indebtedness.—A national bank may enforce against the mortgagee, and parties claiming under him with notice, a mortgage of lands executed to it as collateral security for his then existing indebtedness to it, and such as he might thereafter incur. *National Bank v. Whitnev*, 103 U. S. 99, 26 L. Ed. 443.

Will not be enjoined.—A. executed a promissory note to B., and, to secure the payment thereof, a deed of trust of lands, which was, in effect, a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B., who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A. filed his bill to enjoin the sale, upon the ground that by §§ 5136, 5137, Rev. St., the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. Held, that the bank was entitled to enforce the collection of the note by a sale of the lands. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

a national bank was void.⁹⁶ The decision of the supreme court, of course, is final.

What Constitutes Loan on Real Estate.—A married woman indorsed upon a promissory note: "I hereby charge my separate and personal estate for the payment of the within note." This is not a mortgage in any sense, but simply a personal security, which a national bank is not prohibited from taking.⁹⁷ A loan by a national bank on the stock of a corporation as collateral security is not a violation of the provision of the National Banking Act that such banks shall not loan money on a mortgage of real estate, though the property of the corporation whose stock is pledged consists wholly of real estate.⁹⁸

Debt Presumed Pre-Existing.—Where notes secured by mortgage on land are assigned to a national bank, it will not be presumed that they were assigned for a debt created in *præsenti*, in violation of the National Banking Act. If that fact is relied on to defeat the assignment, it must be affirmatively shown by the party impeaching it.⁹⁹

§ 259 (1abb) Where Taken by Assignment.—The restriction upon a national bank's taking real estate directly for the security of a contemporaneous loan¹ does not apply where notes or other evidences of debt secured by a mortgage in real estate are assigned to the bank and the mortgage passes as an incident to the note.²

96. Overruled cases.—*Beasley v. Bignold*, 5 Barn. & Ald. (Eng.) 335; *Forster v. Taylor*, 5 Barn. & Ald. (Eng.) 887; *Cope v. Rowlands*, 2 Mee. & W. (Eng.) 149; *Kansas Valley Nat. Bank v. Rowell*, Fed. Cas. No. 7,611, 2 Dill. 371; *In re Freyvogel*, Fed. Cas. No. 5,115; *Ripley v. Harris*, Fed. Cas. No. 11,853, 3 Biss. 199; *Brown v. Tarkington* (U. S.), 3 Wall. 377, 18 L. Ed. 255; *Fridley v. Bowen*, 87 Ill. 151; *State Nat. Bank v. Flathers*, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; *White v. Franklin Bank* (Mass.), 22 Pick. 181; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425; *Swope v. Leffingwell*, 4 Mo. App. 525; *Bank v. Clark*, 4 Mo. 59; *Griffith v. Commonwealth Bank*, 4 Mo. 255; *Bank v. Young*, 37 Mo. 398; *Downing v. Ringer*, 7 Mo. 585; *Richards v. Kountze*, 4 Neb. 200; *Crocker v. Whitney*, 71 N. Y. 161, reversed in 103 U. S. 99, 26 L. Ed. 443; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Woods v. People's Nat. Bank*, 83 Pa. 57.

97. *Third Nat. Bank v. Blake*, 73 N. Y. 260.

98. *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *S. C.*, 26 Minn. 62, 1 N. W. 585.

99. *Richards v. Kountze*, 4 Neb. 200.

1. See post, "Loans and Discounts," § 269.

2. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *State Nat. Bank v. Flathers*, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; *Weir v. Birdsall*, 27 App. Div. 404, 50 N. Y. S. 275; *First Nat. Bank v. Andrews*, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885.

Note secured by mortgage.—A national bank may take as collateral security for a loan a note of a third person, though such collateral note is secured by real estate. *Merchants' Nat. Bank v. Mears*, Fed. Cas. No. 9,450, 8 Biss. 158.

S., a commission merchant in St. Louis, to secure a debt of \$6,500 due a national bank in Illinois, transferred to the bank a note of \$20,000, of M., secured by a deed of trust on real estate subject to further liens. M. executed to the bank a deed of the property in payment of the sum due from him, the bank agreeing to discharge the other liens thereon. Held, that such transaction was allowed by the national banking law, permitting such banks to "purchase, hold, and con-

§ 259 (1abc) Where Taken by Subrogation.—A national bank may be substituted to the rights of a surety who has taken a mortgage on real estate.³

§ 259 (1ac) Power to Lease Land.—The power conferred on national banks to purchase and hold such real estate as shall be necessary for its immediate accommodation in the transaction of its business, includes the

vey" real estate for certain purposes and no other. *Mapes v. Scott*, 88 Ill. 352.

Under The National Banking Act, § 28, allowing national banks to hold real estate mortgaged or conveyed to it as security or in satisfaction of debts previously contracted, such a bank may take an assignment of notes secured by mortgage as security or in satisfaction of a debt previously contracted, and the mortgage will not be extinguished by the assignment. *Richards v. Kountze*, 4 Neb. 200.

Purchase of notes.—It is competent for a national bank to purchase a note in favor of a third party, and thereby acquire incidentally a mortgage on land which had been given to secure it; and the claim so evidenced may be incorporated with other indebtedness, and a new mortgage on real estate taken to secure the whole sum. *Oldham v. First Nat. Bank*, 85 N. C. 240.

Note secured by personal and real securities.—Under Rev. St., § 5137, giving powers to national banks to purchase, hold, and convey real estate, such bank has power to take from a customer, as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent, and the personal securities prove insufficient, the bank can maintain a bill to foreclose the mortgage. *Merchants' Nat. Bank v. Mears*, Fed. Cas. No. 9,450, 8 Biss. 158.

Rev. St., § 5136, subd. 7, authorizes national banks to loan money on personal security. A bank loaned money, the borrower giving his note therefor, and transferring securities as collateral, among which was a note held by the borrower, and secured by a real-estate mortgage. The loan having been reduced by the other collaterals, the bank took the mortgage to secure the balance. Held, that the transaction was valid. *Merchants' Nat. Bank v. Mears*, Fed. Cas. No. 9,450, 8 Biss. 158.

Discount of notes secured by mortgage.—If a note secured by a deed of trust on real estate be discounted by a national bank, the security passes to the bank and may be enforced by it. *Thornton v. National Exch. Bank*, 71 Mo. 221.

Mortgage given one partner by another.—A national bank refused to negotiate a loan upon the responsibility of a firm, but agreed to and did make the loan upon a note made by one member of the firm to the other, and indorsed by the latter to the bank, the maker giving a bond and mortgage upon separate property to secure the indorser against liability upon his indorsement, with an agreement that, in case of default, the security should inure to the bank. Held, that the bond and mortgage were not within the prohibition of § 28 of the National Banking Act against such banks holding real estate by purchase or mortgage; that the same were, therefore, legal and binding, and might be enforced for the benefit of the bank. *First Nat. Bank v. Haire*, 36 Iowa 443.

Bank organized from state bank.—Under Act U. S. June 3, 1864, § 44, providing that state banks may be reorganized into national banks, and § 28, providing that national banks may purchase, hold, or convey such real estate as may be mortgaged to them in good faith by way of security for debts previously contracted, a national bank, organized from a state bank, may take an assignment of a note with mortgage security from the latter, and enforce collection by foreclosure. *Scofield v. State Nat. Bank*, 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412.

3. Acquired by subrogation.—*Magoffin v. Boyle Nat. Bank*, 24 Ky. L. Rep. 585, 69 S. W. 702.

Under Rev. St., § 5137, giving power to a national bank to hold real property, such bank may hold real estate security acquired by subrogation as holder of a negotiable note. *Mathews v. Abbott*, Fed. Cas. No. 9,275, 2 Hask. 289.

power to lease real estate for such purpose,⁴ and a bank does not exceed its powers by leasing ground for a term of years under an agreement with the owner that it will erect a building thereon for its use, providing it acts in good faith, and for the purpose of obtaining an eligible location and a suitable building in which to conduct its business.⁵ Nor is such a lease invalid because the aggregate rental which the bank agrees to pay during the term in monthly installments exceeds its capital stock. Such an agreement does not create an indebtedness for the aggregate amount of the installments.⁶ The lessor is not accountable to the creditors or stockholders where the bank exceeds its powers by expending an unauthorized amount in the erection of a building to become a part of the lessor's land.⁷ A lease by a national bank before receiving authorization from the comptroller to begin the business of banking, of a bank building, is *ultra vires*, and will not support an action for rent or for anything beyond the value of what the bank has actually received and enjoyed.⁸

§ 259 (1b) Personal Property.—A national bank has no power to deal in personal property,⁹ but it may take such property to avoid a pecuniary

4. Power to lease land.—*Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

5. Term of lease.—A lease of property by a national bank for ninety-nine years is not *ultra vires* and void because the term will outlast its corporate life. Being authorized by the statute to purchase real estate in fee simple for specified purposes, it may acquire any lesser estate or interest which is vendible. Decree 112 Fed. 577, affirmed. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration of its charter, even though the lease is assignable only by consent of the lessor. Judgment, *International Trust Co. v. Weeks*, 116 Fed. 898, reversed. *Weeks v. International Trust Co.*, 69 C. C. A. 236, 125 Fed. 370.

6. Amount of rent.—Rev. St., § 5202 [U. S. Comp. St. 1901, p. 3494]. Decree 112 Fed. 577, affirmed. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981; affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

A contract by which a national bank leased ground for ninety-nine years, agreeing to pay a monthly rental therefor, does not create an indebtedness for the full amount of the rental accruing during the term. *Brown v.*

Schleier, 112 Fed. 577; S. C., 55 C. C. A. 475, 118 Fed. 981. Affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

7. Liability of lessor to creditors.—A lessor of real estate to a national bank for a long term, in which the bank covenants to erect a bank building which shall become part of the realty, can not be held accountable to the stockholders or creditors of the bank because it may have exceeded its powers by expending more money in the erection of the building than it was authorized to do under the law, and more than was required by the terms of the lease; nor can such excessive expenditure be charged as a lien upon the property in favor of creditors after the same has passed into the hands of the lessor. Decree 112 Fed. 577, affirmed. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

8. Before authorized to do business.—The last clause of Rev. St., § 5136, forbids a national bank, which has filed its articles of association and certificate of organization with the comptroller, from transacting "any business, except such as is incidental and necessarily preliminary to its organization," until authorized by the comptroller to begin the business of banking. *McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381, affirmed in 165 U. S. 533, 41 L. Ed. 817, 17 S. Ct. 433.

9. Personal property.—Under Rev.

loss¹⁰ or as security for loans or for bills of exchange purchased.¹¹ Where a bank takes personal property to be sold and the proceeds applied to an indebtedness to the bank and the surplus to be returned to the debtor, the bank is liable for such surplus.¹² The national banking laws do not prevent a national bank from selling on credit grain owned by it, and acquiring a seed-grain lien for the price, under a state statute.¹³ The Revised Statutes giving national banks such powers as are necessary for the transaction of their business, does not relieve a national bank interested in such a transaction from the operation of an act of a state, providing that, where cotton has been sold under a cash contract, the title should not pass to the buyer until the price has been paid.¹⁴

§ 259 (2) Right to Improve Property.—Where a national bank has acquired property by purchase or lease for the purpose authorized by the statute, it may improve the same in any manner that other prudent owners would do, so as to render it most productive. It is not limited to the construction of a building sufficient only for its own use.¹⁵ A national bank

St. U. S., § 5136 [U. S. Comp. St. 1901, p. 3455], prescribing the powers of national banks, authorizing them to take personal property as security for loans or for bills of exchange purchased by them, but not to deal in merchandise of any kind, the fact that the transfer to a national bank of bills of lading attached to drafts on a purchaser of hay amounted to a sale of the hay would not entitle the final purchaser to recover from the bank for deficiency in the quality of the hay, since the transaction would be *ultra vires*. *Leonhardt & Co. v. Small & Co.*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A., N. S., 887.

10. A national bank may purchase wheat where the purchase is necessary to protect its interests. *First Nat. Bank v. Bannister*, 7 Kan. App. 787, 54 Pac. 20.

11. **Security for loan.**—*Leonhardt & Co. v. Small & Co.*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A., N. S., 887. See post, "Power with Regard to Security Taken," § 269 (3).

Advances for growing of crops.—The mere fact that a national bank and a person engaged in buying grain arrange that the contracts of sales for future delivery into which such person has entered shall be transferred to the bank as security for advances made or to be made by it, and that the proceeds derived from the sales of grain shipped and sold by the bank for the benefit of such person should be applied in protecting his contracts for future delivery, does not render

the bank a dealer in board of trade options, so as to make the transactions *ultra vires*. *Morris v. Dixon Nat. Bank*, 55 Ill. App. 298.

12. **Surplus of proceeds of sale.**—A company indebted to a national bank on a note, and also to its president and cashier on indorsements made for it, turned over to such officers its property, to be sold, and the proceeds applied on such indebtedness, the surplus, if any, to be paid to the company. Held that, regardless of the question of the liability of the officers, the bank, as such, was liable to the company for a surplus which it received and used in its business. *Paxton v. Vincennes Mfg. Co.*, 20 Ind. App. 253, 50 N. E. 583.

13. *First Nat. Bank v. Peavy Elevator Co.*, 10 S. Dak. 167, 72 N. W. 402.

14. *National Bank v. Augusta Cotton, etc., Co.*, 104 Ga. 403, 30 S. W. 888; *South Carolina, etc., R. Co. v. Augusta Cotton, etc., Co.*, 105 Ga. 486, 30 S. E. 891.

15. **To improve property.**—Decree 112 Fed. 577, affirmed in *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

A national bank leased ground for a term of ninety-nine years, and expended over \$300,000 in the erection of a building thereon. It occupied a portion of the building as a banking house, and rented the remainder to tenants. By a subsequent contract it surrendered the building to the owner of the land, and the lease was can-

which has lawfully acquired the title to property in payment of a debt has implied authority to make reasonable repairs thereon for the purpose of putting it in a salable condition, and its directors can not be held personally liable for money so expended in good faith.¹⁶ The purchase of stock, by a national bank, in a corporation one of the objects of which is the improvement of real estate, is not within the inhibition upon national banks to engage in the improvement of real estate not necessary for their own use.¹⁷

To Provide Offices to Rent.—Where a national bank in flourishing condition has been for many years the rightful owner of a lot improved by its bank building, it had power to alter and enlarge the improvement thereon so as to furnish better accommodation for the bank's business, and at the same time provide offices which could be rented to tenants.¹⁸

To Mine on Property.—A national bank has no power to prospect for mineral nor to prosecute a mining business on property which it has acquired, and directors who authorize such expenditure are personally liable therefore to the bank or its receiver.¹⁹

§ 259 (3) Right to Convey Property.—The National Bank Act, authorizes national banks to purchase real estate under certain restrictions, but places no restriction upon the power to convey.²⁰ Where a national bank lawfully holds realty, it may convey the same on credit, as well as for cash, and take a mortgage to secure the unpaid purchase money.²¹

Right to Exchange Property.—A national bank has the power to enter into an agreement to accept personal property in payment for its real estate, which it has disposed of.²²

§ 260. Contracts and Dealings—§ 260 (1) In General.²³—A national bank may ratify and become bound by a contract made by the pro-

ceeded. A receiver was afterwards appointed for the bank, who brought suit to charge the property with a lien for the money expended in the erection of the building, on the ground that the action of the bank in making the lease and in expending the money was ultra vires. No fraud was shown in the transaction, and it did not appear that any of the creditors were such when the lease was made. Held, that the receiver, under such circumstances, had no greater rights than the bank, and that the bill stated no grounds for relief. *Brown v. Schleier*, 112 Fed. 577; S. C., 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

^{16.} *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582.

^{17.} *Western Imp. Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

^{18.} *Wingert v. First Nat. Bank*, 99 C. C. A. 315, 175 Fed. 739.

^{19.} *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582.

^{20.} *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355, 29 Am. Rep. 335.

^{21.} **Reserved vendor's lien.**—First Nat. Bank v. Kidd, 20 Minn. 234, Gil. 212.

A bank organized under the National Banking Act may sell any immovable it owns, and reserve a mortgage and vendor's privilege on it. *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355, 29 Am. Rep. 335.

^{22.} *First Nat. Bank v. Reno*, 73 Iowa 145, 34 N. W. 796.

^{23.} **Contracts and dealings.**—See ante, "Contracts in General," § 96; "Banking Powers," § 258.

As to contract of guaranty, see ante, "Banking Powers," § 258. As to borrowing money, see ante, "Banking Powers," § 258.

motors before its organization. Whether or not the contract has been ratified is a question for the jury.²⁴

§ 260 (2) Acquiring or Dealing in Stock of Other Corporations
—§ 260 (2a) In General.—Questions as to the power of a national bank

to purchase or own stock in other corporations must be determined from the statutes of the United States as construed by the United States supreme court.²⁵ A national bank has no power to deal in stocks, and can not, therefore, acquire the stock of another corporation,²⁶ except as incidental to its power to lend money on personal security,²⁷ or in satisfaction of indebtedness to it.²⁸

§ 260 (2b) As Investment or Speculation.—A national bank is without power to purchase, as an investment, with its surplus funds, and to hold as such, shares of stock in another national bank.²⁹ A national bank has

24. Made before organization.—*McDonough v. First Nat. Bank*, 34 Tex. 309.

Under the provision of the national banking law (Rev. St. U. S., § 5136) that "no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking," a lease by an association formed under said act, but not authorized by the comptroller to commence the business of banking, of premises "to be used as a banking office, and for no other purpose," is ultra vires and void, and there can be no recovery against the association for the rental of such premises, except upon the ground and to the extent of the benefits received. *McCormick v. Market Nat. Bank*, 162 Ill. 100, 44 N. E. 381, affirming 61 Ill. App. 33; affirmed in 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433.

25. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206.

26. *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831. Judgment 65 C. C. A. 620, 132 Fed. 658, affirmed. *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206.

Impliedly prohibited.—Dealing in stocks by a national bank is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320;

California Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782. See *Scott v. Deweese*, 181 U. S. 202, 217, 45 L. Ed. 822, 21 S. Ct. 585.

The power to purchase or deal in stock of another corporation, being not expressly conferred upon national banks, nor an act which may be exercised as incidental to the powers expressly conferred, a dealing in stocks is consequently an ultra vires act. Being such, it is without efficacy. *Pearce v. Madison, etc., R. Co.* (U. S.), 21 How. 441, 445, 16 L. Ed. 184; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782. See *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585.

27. *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831.

28. *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306.

29. For investment.—Judgment 24 C. C. A. 444, 79 Fed. 51, reversed. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739; *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

Under Rev. St., § 5136 (U. S. Comp.

no power to purchase corporate stock for speculation.³⁰ The want of au-

St. 1901, p. 3455), a purchase of corporate stock by a national bank for the purpose of selling the same at a profit was ultra vires and voidable as between the parties. *Barron v. McKinnon*, 196 Fed. 933.

"The reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when the other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant states, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful." *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

Estoppel by receipt of dividends.—

A national bank, which, as a matter of fact, purchased, and held as an investment, shares of stock in a second national bank, and received dividends thereon, is not thereby estopped to plead the unlawfulness of its action in defense to an action by the receiver of the second bank, after its insolvency, to collect an assessment made on the shareholders by the comptroller. The contract by which it assumed to become a shareholder, being ultra vires and in contravention of the policy of the statute, was not merely voidable, but void, and could not be given validity, nor made the foundation of any right of action, by any subsequent ratification or act of performance. Judgment 24 C. C. A. 444, 79 Fed. 51, reversed. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739.

Assessed as stockholder.—A national bank has no power to invest its surplus fund in the stock of another national bank, and can not be assessed thereon as a stockholder, although it actually made the purchase and held and received dividends on the stock. *Shaw v. National German-American Bank*, 65 C. C. A. 620, 132 Fed. 658, affirmed in 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750.

If it be conceded that the liability of a shareholder in a national bank to respond to an assessment in case

of insolvency is statutory, and not contractual, such fact does not affect the question of the liability of another national bank, holding stock in the insolvent bank as an investment, without authority of law, for such an assessment, as congress can not reasonably be presumed to have intended to subject the stockholders and creditors of the defendant bank to a liability, the power to assume which it had denied to the bank for their protection. Judgment 24 C. C. A. 444, 79 Fed. 51, reversed. *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739.

30. For speculation.—*First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306. See, also, *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613; *First Nat. Bank v. National Exch. Bank*, 39 Md. 600.

The power of a national bank to engage in this character of business can not be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt, does not imply that because a national bank has lent money to a corporation, it may become an organizer and take stock in a new and speculative venture. *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306.

Stock of another national bank.—

Purchase of another national bank stock for speculation by a national bank is ultra vires. *Metropolitan Trust Co. v. McKinnon*, 172 Fed. 846.

An agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction; such securities having been received by such maker as trustee for the bank. *Tillinghast v. Carr*, 82 Fed. 298.

What amounts to purchase for speculation.—The president of a national bank who largely controlled its policies purchased stock in violation of

thority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder.³¹

§ 260 (2c) As Satisfaction of Debt.—Debt Due to Bank.—A national bank may accept stocks in satisfaction of a debt, with a view to their subsequent sale or conversion into money in order to make good or reduce an anticipated loss.³²

his duty so as to make him liable to the bank for the resulting loss. The National Treasury Department after an examination required the bank to immediately dispose of the stock which could not then be done without loss, whereupon, pursuant to an arrangement with the department, the president and his son executed a bond to the bank, prepared by the Treasury Department conditioned to be void if within two years the bank should sell the stocks and realize therefrom, their cost, whereupon the Treasury Department withdrew its demand for the immediate sale of the stock. Held, that the execution of the bond was not an agreement by the bank not to sell the stocks for two years whatever might be their market fluctuations, thereby making the bank to speculate in stocks, so as to be ultra vires on the part of the bank, especially when considered as a covenant as prescribed in Code Civ. Proc., § 1915, providing that a bond in a penal sum containing a condition to the effect that it is to be void upon the performance of any act has the same effect for the purpose of maintaining an action thereon as if it contained a covenant to perform the act specified in the condition. *First Nat. Bank v. Jenkins*, 73 Misc. Rep. 277, 130 N. Y. S. 947.

31. *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306.

32. **Satisfaction of debt due bank.**—*First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Pac. 320; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306.

A national bank may acquire stock, to be afterwards converted into money, to avert or diminish an apprehended loss on account of a claim to which the bank has been subjected. *First Nat. Bank v. National Exch. Bank*, 39 Md. 600.

A national bank, which in the ordi-

nary course of business receives stock as collateral security for a loan, may protect itself from loss by taking the stock in payment of the loan. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A., N. S., 551, 111 Am. St. Rep. 637.

Does not amount to dealings in stock.—Such transactions would not amount to dealing in stocks, and they come within the general scope of the powers committed to the board of directors and the officers and agents of a national bank. Subject to such restraints as its charter and by-laws impose, they may do in this behalf whatever natural persons can lawfully do. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Pac. 320.

Shares of partnership.—A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold. *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 285, 50 L. Ed. 1036, 26 S. Ct. 613.

Corporation engaged in speculation.—It is ultra vires of a national bank to take stock in a corporation organized to embark in the purely speculative business of buying and selling the stocks and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business, although the bank takes such stock in exchange for a claim against the insolvent corporation. *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306.

Insolvent corporation.—A contract by the terms of which a national bank receives corporate stock of another corporation in payment of a debt owing to the bank by such other corporation is not ultra vires as to the bank when, at the time of making the contract, such corporation is financially embarrassed, and unable to meet its

Debt Due from Bank.—In adjusting and compromising contested claims against it, growing out of a legitimate banking transaction, a national bank may pay a larger sum than would have been exacted in satisfaction of them, so as to thereby obtain a transfer of stocks of railroad and other corporations, in the honest belief that by turning them into money under more favorable circumstances than then existed, a loss, which it would otherwise suffer from the transaction, might be averted or diminished.⁵³

§ 260 (2d) As Security for Loan.—For Pre-Existing Loan.—A national bank possesses the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness.⁵⁴

For Present or Future Loans.—As incidental to the power to loan money on personal security, a national bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders.⁵⁵ A national bank

commercial obligations as they mature. Such contract is directly incidental to the proper exercise of the powers for which the bank was chartered. *Tourtlot v. Whithed*, 9 N. Dak. 407, 84 N. W. 8.

33. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320.

34. **As security for loan.**—*California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613. See post, "Loans and Discounts," § 269.

35. **For present or future loans.**—*Canfield v. State Nat. Bank*, Fed. Cas. No. 2,382; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. Ed. 855; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

Under Act June 3, 1864 (13 Stat. 101), which authorizes national banks to exercise under that act all such incidental powers as shall be necessary to carry on the business of banking, and, among other powers, to loan

money on personal security, gives a national bank power to make loans on the negotiable notes of persons or firms, secured by stock and bonds of marketable value as collateral, such stock being collateral to the personal obligation of the borrower. *Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101.

It is a general proposition of law that a national bank may take by way of security property in which it is not authorized to invest, and may become owner of it by foreclosure or in satisfaction of a debt. It may acquire stock in a corporation in this way, *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320, and so subject itself to the liability of a stockholder for the corporate debts. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. Ed. 537, 26 S. Ct. 306, a proposition not shaken by *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

It is true that a statute may add a liability to a stock holding, but when, as is usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds. *Merchants' Nat.*

may sell the stock at any time after the loan becomes due.³⁶

§ 260 (2e) As Agent or Broker.—A national bank has no authority to sell stocks³⁷ or bonds³⁸ on commission for its customers.

§ 260 (2f) Effect of Ultra Vires Act.—A sale of corporate stock to a national bank, though ultra vires between the parties, passed the title to the bank, and it could transfer the same to a purchaser in the absence of a prior repudiation of the transaction by either of the original parties.³⁹ But a

Bank *v.* Wehrmann, 202 U. S. 295, 50 L. Ed. 1036, 26 S. Ct. 613.

What amounts to taking as collateral.—Certificates of stock in a corporation were issued to different parties, some of whom were connected with a national bank, and their names were inserted therein, though it did not appear that the certificates were subscribed for by them or delivered to them. Some of the certificates were transferred to the bank without indorsement, and the others were surrendered, new certificates being issued in the name of the bank. One of the parties, the cashier of the bank, presented the certificates to the corporation, and had the stub of the certificates show that they were presented and surrendered for transfer by the bank. Held, not to show that the bank had acquired the stock as collateral, as authorized by the National Banking Act. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206.

36. *Canfield v. State Nat. Bank*, Fed. Cas. No. 2,382.

37. Agent to sell—Bank held liable.—Defendant national bank received from plaintiff, a depositor, railroad stock to be sold for his account on his direction, and transmitted it to brokers, who, on the order of plaintiff, given to defendant, and communicated by it to them, sold the stock. They then sent their check for amount of the proceeds to defendant, payable to its order. Defendant credited plaintiff's account on its books with the amount of the check, and then sent the check, with others, for collection for its account; but payment was refused, the brokers having failed before its presentation. In the meantime defendant had given plaintiff notice of the credit on his account, and he had thereupon drawn out an amount in excess thereof. Held, that the bank being in the matter of the bonds merely an agent to sell, and its acceptance of the check in payment not having been ratified by plaintiff, it was

liable for the amount thereof, and could not charge it back against plaintiff's account. *Pepperday v. Citizens' Nat. Bank*, 183 Pa. 519, 38 Atl. 1030, 39 L. R. A. 529, 63 Am. St. Rep. 769.

To sell stocks on commission.—A national bank is not authorized to sell stocks on commission for its customers. *Searle v. First Nat. Bank*, (Pa.), 2 Walk. 395.

38. To sell bonds on commission.—*Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 10 Am. St. Rep. 879.

A national bank has no power to engage in the business of selling mortgage bonds on commission. *Farmers*, etc., *Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

A national bank organized under the Act of congress approved June 3, 1864, known as the "National Currency Act," has no authority to engage in the business of selling the bonds of railroad companies on commission. Such business is not within the scope of its corporate powers, and is, therefore, prohibited. *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

State bonds.—A national bank can not act as broker for the sale of state bonds on commission. *Smith v. Philadelphia Nat. Bank* (Pa.), 1 Walk. 318.

City bonds.—On a receipt: "Received of H. \$1,000, to be invested in bonds of the city of Allentown, bearing seven per cent interest. Interest on said deposit to be allowed from this date, and to be accounted for on demand. W. H. Blumer, President First Nat. Bank"—held, that H. could not maintain an action against the bank for a misappropriation of the money. A national bank has no such incidental, charter, or statutory powers to enable it to act as broker or agent in the purchase of bonds and stocks. *First Nat. Bank v. Hoch*, 89 Pa. 324, 33 Am. St. Rep. 769.

39. Effect of ultra vires act.—A purchase of real estate by a national bank for a purpose other than that specified

national bank which deals in stocks of another corporation, in violation of the National Banking Law, may urge its want of power in avoidance of liability as a stockholder; and this, though it accepted dividends on such stock.⁴⁰

§ 260 (3) Purchase by Bank of Its Own Stock or Loaning Money on Security Thereof.—The act of congress declares that no national bank shall be the purchaser of any shares of its own capital stock, unless the purchase be necessary to prevent a loss upon a debt previously contracted.⁴¹ A national bank is not authorized to sell and deliver shares for which a note was given, on the agreement that when the note should fall due, the maker, at his election, could exchange the shares thereof.⁴²

Recovery of Purchase Price.—The purchase of its own stock by a national bank, not for the purpose of preventing, or necessary to prevent, a loss upon a debt previously contracted, is illegal, and the bank may maintain an action at law to recover the money paid therefor without tendering back the stock.⁴³

Ratification of Purchase by Officer.—The sale by the president of a national bank, to himself and the cashier, of the stock of the bank, owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank, if its own stock, where he acts in the double capacity of seller and buyer, can not be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon the debt previously contracted.⁴⁴

Rights and Liabilities of Vendor.—Although a national bank can not

by Rev. St., § 5137 (U. S. Comp. St. 1901, p. 3460), is voidable only and not void. *Barron v. McKinnon*, 196 Fed. 933.

Though a bank has no power to loan money on its own stock, as collateral, in violation of Rev. St., § 5201 (U. S. Comp. St. 1901, p. 3494), if it does so and takes the stock, it may convey a good title to a purchaser. *Barron v. McKinnon*, 196 Fed. 933.

40. *Chemical Nat. Bank v. Havermale*, 120 Cal. 601, 52 Pac. 1071, 65 Am. St. Rep. 206.

The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, being void, can not be ratified, and therefore the bank is not estopped to deny its liability for the debts of such corporation, though it has received dividends on the stock. *California Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831.

But a national bank having purchased the stock of a dealer in wall paper at a sale under an execution in its favor, and organized a corporation to dispose of it, new stock was purchased on credit; the bank, through its

cashier, informing the seller of its relation to the corporation, and that it would see that the bills were paid. Held, that the bank could not defeat an action for the price because of want of power to make the purchase. *American Nat. Bank v. National Wall Paper Co.*, 23 C. C. A. 33, 77 Fed. 85.

41. **Purchase of bank's own stock.**—*Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *United States v. Britton*, 107 U. S. 655, 27 L. Ed. 520, 2 S. Ct. 512; *Meyers v. Valley Nat. Bank*, Fed. Cas. No. 9,519.

42. *Atwater v. Stromberg*, 75 Minn. 277, 77 N. W. 963.

43. *Burrows v. Niblack*, 28 C. C. A. 130, 84 Fed. 111.

44. **Ratification of purchase by officer.**—In the one case the sale of the stock is commanded by law, and its sale by the president may be ratified, however irregular it may have been in the first instance; but the purchase of its own stock by the bank is interdicted by law, and for this act there can be no authorization in advance, and no ratification afterwards. *Bundy v. Jackson*, 24 Fed. 628.

purchase its own capital stock, one who, through a broker, sold stock in good faith to the president of a bank, receiving the president's individual check, and supposing that the president purchased individually, is not liable to the receiver of the bank in an action to recover back the price, though the stock was in fact purchased by the president with funds of the bank, and was entered upon its books as purchased and held by him as trustee of the bank.⁴⁵

Rights and Liabilities of Purchaser.—The fact that a national bank purchased shares of its own stock ultra vires does not render its subsequent sale of such stock to another unlawful, or the stock void in the hands of the purchaser;⁴⁶ nor does it constitute any defense to an action by a receiver of the bank against such purchaser to recover an assessment made after the bank's insolvency.⁴⁷

Loan on Security Thereof.—Under the national currency act a national bank can not make a valid loan or discount on the security of its own stock, unless necessary to prevent loss on a debt previously contracted in good faith.⁴⁸ The placing by one bank of its funds on permanent deposit with another bank is a loan within the national currency act, prohibiting any loan or discount on the securities of a bank's own capital stock.⁴⁹

§ 260 (4) Guaranty or Indemnity.—A national bank has no power to lend its credit to any person or corporation,⁵⁰ or to become guarantor of the

45. Rights and liabilities of vendor.—A stockholder in a national bank sold his stock in good faith to a broker, transferring the shares by subscribing a blank power of attorney on the back thereof, which authorized the purchaser to transfer the shares on the books of the bank. The broker failed to disclose his principal, who was in fact the president of the bank, who, on receiving the shares, had the amount charged to himself "as trustee of the bank," and credited to his personal account. Held, that the title to the shares passed when the vendor delivered the certificates to the broker with authority to transfer them, and that, the sale having been made in good faith, and without knowledge on the vendor's part that the purchase was for the benefit of the bank, which would render the transfer void under The National Banking Act of 1864, prohibiting a national bank from purchasing its own shares, the vendor was not liable as a stockholder for the debts of the bank on its subsequent failure. *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532, affirming Fed. Cas. No. 7,393, 5 Dill. 65.

46. Rights and liabilities of purchaser.—*Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

The statutory inhibition against the

purchase by a national bank of its own stock does not render stock so purchased void; and where, in such case, the stock is held for the bank by a nominal owner, a subsequent purchaser for value received by the bank acquires a good title, which can not be questioned by the bank or its creditors. *Wallace v. Hood*, 89 Fed. 11; *Hood v. Wallace*, 38 C. C. A. 692, 97 Fed. 983, judgment affirmed in 182 U. S. 555, 45 L. Ed. 1227, 21 S. Ct. 885.

But it has been held that a national bank is prohibited, by Rev. St., § 5201, from being a purchaser of its own stock, and it can not, by purchase and transfer, vest title in another. *Meyers v. Valley Nat. Bank*, Fed. Cas. No. 9,519.

47. *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

48. Loan on security thereof.—Act of June 3, 1864 (12 Stat. 101); *Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 173; *Fleckheimer v. National Exch. Bank*, 79 Va. 80. See post, "Power with Regard to Security Taken," § 269 (3).

49. *Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 173.

50. Loan of credit.—*National Bank v. Atkinson*, 55 Fed. 465; *Merchants' Bank v. Baird*, 160 Fed. 642. Judg-

obligations of another,⁵¹ except in the ordinary course of banking.⁵² The act of congress confers no authority upon national banks to guaranty the payment of debts contracted by third parties, and acts of that nature, whether performed by the cashier of his own motion or by the direction of the board of directors, are necessarily *ultra vires*.⁵³

For Sole Benefit of Another.—An agreement by a national bank, to guaranty the payment of a debt of a third person, solely for his benefit, is *ultra vires*.⁵⁴ Where a bank directs a letter to a person, stating that it will guarantee the fulfillment of the obligations of another person to the former for a certain amount of goods for a certain time, and it does not appear that the second person purchased the letter or deposited any security therefor, or that the bank had any interest in the transaction, the letter, considered either as a guaranty or letter of credit, is void, and the bank is not liable thereon.⁵⁵ It has been held that the business in which a national bank may engage does not include the making representations as to the genuineness of the signatures of a note sent to it by another bank to procure such signatures as a mere gratuitous accommodation; and it is not bound by representations of its officers that the signatures so procured are genuine.⁵⁶

ment 87 Fed. 430, affirmed. *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925; *Thilmany v. Iowa Paper-Bag Co.*, 108 Iowa 332, 79 N. W. 68; *National Bank v. Wells*, 79 N. Y. 498; *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590.

51. Guaranty.—Judgment 87 Fed. 430, affirmed. *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *Bank v. Sixth Nat. Bank*, 28 Pa. Super. Ct. 413; *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590.

52. In course of business.—Judgment 87 Fed. 430, affirmed. *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925; *Barron v. McKinnon*, 179 Fed. 759; *First Nat. Bank v. Monroe*, 135 Ga. 614, 69 S. E. 1123; *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590.

53. Fidelity, etc., Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

54. For sole benefit of another.—*Bowen v. Needles Nat. Bank*, 87 Fed. 430, affirmed in 36 C. C. A. 553, 94 Fed. 925; *Merchants' Bank v. Baird*, 160 Fed. 642; *First Nat. Bank v. Monroe*, 135 Ga. 614, 69 S. E. 1123; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782; *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590, affirmed in 93 Tex.

708, no op. But see *Seeber v. Commercial Nat. Bank*, 77 Fed. 957.

The act of congress authorizing the organization of national banks confers upon them no authority to guaranty the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature are necessarily *ultra vires*. *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799.

A national bank has no power or authority to become a mere accommodation indorser or guarantor of the payment of a debt of another, without benefit to the bank. *Bank v. Sixth Nat. Bank*, 28 Pa. Super. Ct. 413.

It has never been supposed that the board of directors of a national bank can bind it by contracts of suretyship or guaranty which are made for the sole benefit and advantage of others. *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782, affirmed, no op., citing *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059.

55. Thilmany v. Iowa Paper-Bag Co., 108 Iowa 332, 79 N. W. 68.

56. Representations as to genuineness of note.—Under the national banking law, which empowers national banks to exercise all the incidental powers necessary to the business of banking, by discounting and negotiating notes and evidences of debt, receiving deposits, giving in exchange coin

For Benefit of Depositor.—A national bank, upon the deposit of collateral security with it, has no power to guaranty the obligation of the person making such deposit.⁵⁷

Payment of Negotiable Paper.—A national bank may guaranty the payment of commercial paper as incidental to the exercise of its power to buy and sell the same,⁵⁸ if not solely for the benefit of another.⁵⁹ But such

and bullion, lending money and circulating notes, the procurement of a signature to a note for another bank, in order that it may lend money to a third person, and a representation that the signature is genuine, are not within the powers of a national bank, and it is not liable where the note turns out to be a forgery. Judgment (Tex. Civ. App.), 77 S. W. 239, reversed. Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879.

57. For benefit of depositor.—A national bank has no authority to guaranty the paper of a customer for accommodation, though the customer deposits collateral security to indemnify the bank. Seligman v. Charlottesville Nat. Bank, Fed. Cas. No. 12,642, 3 Hughes 647.

An agreement by a national bank to guaranty a letter of credit on the holder of the letter depositing securities with it is not within its power, as being a power incidental to banking. Seligman v. Charlottesville Nat. Bank, Fed. Cas. No. 12,642, 3 Hughes 647.

58. Payment of negotiable paper.—Judgment 87 Fed. 430, affirmed. Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; Thomas v. City Nat. Bank, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Appleton v. Citizens' Cent. Nat. Bank, 116 App. Div. 404, 101 N. Y. S. 1027.

A national bank may endorse or guaranty the payment of commercial paper which it holds, when it rediscounts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incidental to the express authority conferred on such banks by the national banking act to discount and negotiate promissory notes, drafts, bills of exchange and other evidence of debt. Fidelity, etc., Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

Undoubtedly a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an

indorsement. People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

A. made his promissory note to his own order, duly indorsed it to the order of B., and delivered it to a national bank. The latter negotiated it to B., and applied the proceeds thereof to the cancellation of a prior debt of A. With the knowledge and consent of the president and cashier, who were also directors, but without any notice to or authority from the board, C., one of the directors and vice president of the bank, guaranteed, at the time of the transaction, the payment of the note at maturity by an indorsement thereon to that effect in the name and on behalf of the bank. The note was duly protested for nonpayment, and the bank notified thereof. B. brought this action against the bank. Held, that the bank was not prohibited by law from guaranteeing the payment of the note. People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

It is to be presumed that C. had rightfully the power he presumed to exercise, and the bank is estopped to deny it. People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

But a guaranty could not be continued in force by agreement of the president made after the bank had gone into liquidation; so as to bind the stockholders. Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

59. For sole benefit of another.—While a national bank in negotiating its paper can bind itself for the payment thereof by its indorsement thereon, it can not guarantee payment of paper of others or become surety thereon, solely for such other's benefit. Rev. St., § 5136 (U. S. Comp. St. 1901, p. 3455), giving such banks power to make contracts and to exercise by duly authorized officers or agents all incidental powers necessary to carry on the business of banking, and the guaranteeing of payment of the obligation of others, solely for their benefit, not being a power incidental to the

bank has no power to bind itself that a draft drawn on its customer will be paid, and, when sued on such a contract, it can plead *ultra vires*.⁶⁰

Accommodation Indorsement.—An accommodation indorsement or acceptance by a national bank is *ultra vires*, and void in the hands of holders with notice.⁶¹ A national bank can not indorse a note for the maker's ac-

transaction of a banking business. *First Nat. Bank v. Monroe*, 135 Ga. 614, 69 S. E. 1123.

Under Rev. St. U. S. 5136 [U. S. Comp. St. 1901, p. 3455], authorizing national banks to exercise such incidental powers as shall be necessary to carry on the business of banking by discounting notes, drafts, etc., a national bank, though having power, as incident to the discounting of a negotiable instrument, to guaranty the payment thereof on discounting the same, has no power to enter into a general contract of guaranty by which it becomes liable for the debt of another. *Appleton v. Citizens' Cent. Nat. Bank*, 116 App. Div. 404, 101 N. Y. S. 1027.

60. To pay draft on third person.—*First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059.

A national bank has no power to guaranty the draft of a third person on one of its customers to be drawn on a future day. *National Bank v. Sixth Nat. Bank*, 212 Pa. 238, 61 Atl. 889.

No action will lie on the promise of the cashier of a national bank to pay the draft of a third person on one of its customers, to be drawn at a future day. *Bank v. Sixth Nat. Bank*, 28 Pa. Super. Ct. 413.

Since a national bank has no power to lend its credit, or to become the guarantor of another's obligation, except in the ordinary course of banking, a national bank's promise that, if the drawee would pay drafts held by it for collection, it would pay his drafts on the drawers for the amount he claimed that such drafts were overdrawn, was unenforceable against the bank. *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590.

A national bank advised plaintiff that it would pay all checks of a third person, although such person had no funds on deposit, as was known to both plaintiff and the bank. In reliance on such promise, plaintiff cashed checks of such person, and transmitted them to the bank for payment. The bank issued and sent to plaintiff its drafts on a correspondent for the amount of the checks, which drafts were refused payment. Held, that the contract was one purely of guaranty,

and was *ultra vires* on the part of the bank, and the transaction gave plaintiff no right of action against it on the drafts. Judgment 87 Fed. 430, affirmed. *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925.

A purchaser of drafts with bills of lading covering corn shipped to plaintiff for sale on commission sent the drafts to defendant, a national bank, for collection, with instructions to deliver each bill of lading only on payment of the draft attached thereto. Plaintiff refused to accept the corn, and the purchaser wrote to the bank, authorizing it to accept drafts drawn by plaintiff on the shipper in part payment of the drafts attached to the bills of lading, representing differences in the price for which the corn was sold; but plaintiff paid the original drafts to the bank in full, and drew on the shipper for the difference, which drafts the bank promised to pay, without authority from the purchaser, and without consideration, and which drafts the shipper refused to pay on presentment. Held, that since a national bank has no power to loan its credit, except in the ordinary course of banking, defendant bank was not liable on the drafts drawn on the shipper for the differences, and hence an action thereon could not be maintained against the purchaser (who was a resident of another county) in the county of the bank's domicile by joining it as a party defendant. *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590.

No intent to purchase.—The agreement of a national bank to pay drafts to be made on a third person against bills of lading was an agreement of guaranty and *ultra vires*; there being no intent on the part of the bank to purchase the drafts. *National Bank v. Sixth Nat. Bank*, 212 Pa. 238, 61 Atl. 889.

61. Accommodation indorsement.—*Bowen v. Needles Nat. Bank*, 87 Fed. 430, affirmed 36 C. C. A. 553, 94 Fed. 925; *National Bank v. Atkinson*, 55 Fed. 465; *Bank v. Sixth Nat. Bank*, 28 Pa. Super. Ct. 413.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of

accommodation, and on the credit of such indorsement procure the note to be discounted by another bank, charging a commission for such loan of its credit.⁶² But where a national bank indorsed a certain note for the accommodation of the maker, and when it became due the bank paid it, and brought suit against the maker, who set up as a defense that the bank had no power to so indorse, it was held that even if the indorsement be void, the note is valid, and the bank is entitled to recover.⁶³

Payment of Loan.—A national bank has no power to guaranty the repayment of a loan to a third person at the bank's request.⁶⁴

Building Contract.—A national bank can not guaranty a building contract between third persons.⁶⁵

Replevin Bond.—The execution of a bond by a national bank as security in a replevin suit is beyond its powers and void.⁶⁶

Indemnifying Surety.—A contract by a national bank to indemnify one for loss incurred as security on an attachment bond will be enforced after the loss has occurred, though the bond was not given for the benefit of the bank.⁶⁷

Against Loss by Commercial Transaction.—A contract by a national bank to guarantee a person against loss in a commercial transaction is ultra vires.⁶⁸

obligations which it rediscounts or sells, but it can not lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being ultra vires, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. *Merchants' Bank v. Baird*, 160 Fed. 642.

Where a party knowingly takes as collateral security drafts of a national bank drawn for the accommodation of a customer, he can not recover upon such drafts in an action against the bank or its receiver, as a national bank has no authority to lend its credit on personal security. *Johnston v. Charlottesville Nat. Bank*, Fed. Cas. No. 7,425, 3 Hughes 657.

62. *National Bank v. Wells*, 79 N. Y. 498.

63. *Gloversville Nat. Bank v. Wells*, 15 Hun (N. Y.), 51.

64. Payment of loan.—A state bank, at the request of a national bank, loaned \$12,000 to a third person on his personal obligation. The national bank guarantied the repayment of the loan. The third person, pursuant to his previous agreement with the national bank, paid to it \$10,000 of the loan, though he was not indebted to it in any amount. Held, that the national bank's contract of guaranty was void as ultra vires, and no action could be

maintained thereon. *Appleton v. Citizens' Cent. Nat. Bank*, 116 App. Div. 404, 101 N. Y. S. 1027.

65. *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334.

66. *Bailey v. Farmers' Nat. Bank*, 97 Ill. App. 66.

67. Indemnifying surety.—*Seeber v. Commercial Nat. Bank*, 77 Fed. 957.

A guaranty against loss or liability for signing as sureties, given by a bank president in his own name, and without authority from the directors, to those whom he had solicited thus to sign a note given to a bank to retire a prior note held by it against their principal, if considered as made by and binding upon the bank, would be a bar to any suit by it against the sureties; and it is doubtful whether, under the general banking law, a national bank could give such a guaranty in a case where the effect would be to make the paper discounted the paper of one party only, secured by mortgage on real estate. *First Nat. Bank v. Bennett*, 33 Mich. 520.

68. Against loss by commercial transaction.—Where a national bank, in order to induce complainant to purchase certain steamship stocks owned by it, agreed to take complainant's note for \$50,000 for the stock and hold the stock as collateral security, and to guarantee plaintiff against any loss in

Effect of Ultra Vires.—Since a national bank has no authority to execute a contract of guaranty or indemnity, it has a right, in an action upon such contract, to plead its want of power; that is, to assert the nullity of an act which is an ultra vires act.⁶⁹ Such an act is not binding on the bank by estoppel, unless it has received the benefits therefrom.⁷⁰ But the doctrine that where a national bank has entered into a contract not illegal, and the other party has performed his part, the bank will not be heard to claim ultra vires to avoid performance on its part, applies to a contract of guaranty.⁷¹

§ 260 (5) Acquiring or Dealing in State and Municipal Securities.—A national bank can properly and legally engage in the business of dealing in and exchanging government securities.⁷² An agreement by a national bank to exchange bonds of one class for those of another for one of its depositors is within the scope of its power to do a general banking business.⁷³ A national bank has power to take and hold interest coupons not under seal, attached to railway aid bonds under seal, where each coupon contains an express promise to pay to bearer, and is signed by the proper officer.⁷⁴

the transaction from the execution and delivery of the note, such guaranty was not an ordinary commercial guaranty, but one outside the ordinary business of banking, and ultra vires. *Barron v. McKinnon*, 179 Fed. 759.

69. *Fidelity, etc., v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782, affirmed, no op.

70. *Groos v. Brewster* (Tex. Civ. App.), 55 S. W. 590, affirmed in 93 Tex. 708, no op.

71. **On receipt of benefits.**—*Gloversville Nat. Bank v. Wells*, 15 Hun (N. Y.), 51.

A complaint alleged that defendant, a national bank, by letter agreed that a draft drawn by plaintiff, not to exceed a certain sum, on a certain firm, for goods shipped to them by plaintiff, should be paid, and that in consideration of such guaranty plaintiff shipped the goods to such firm, but that the draft had not been paid, and defendant refused to pay it. Held, that where a corporation has entered into a contract not illegal, which the other party has performed, it will not be heard to claim ultra vires to avoid performance on his part, and, since the National Banking Act does not prohibit such a contract, the complaint stated a cause of action, and a demurrer thereto should be overruled. *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72, 38 S. E. 252.

72. *Van Leuven v. First Nat. Bank*, 54 N. Y. 671.

73. **Agreement to exchange bonds.**

—Where a bank organized under the federal banking law receives on deposit United States bonds of one class, under promise or agreement to exchange them for those of another, it will not be regarded as a mere mandatory or bailee, acting without compensation, but, on the contrary, held to the terms of the contract, and liable to the depositor for the value of the bonds on its refusal to deliver them. An undertaking or transaction of this character on the part of the bank, is within the scope of its powers to do a general banking business, conferred by the act of congress authorizing the creation of those banks. *Leach v. Hale*, 31 Iowa 69, 7 Am. Rep. 112.

A national bank has corporate power to enter into an agreement with a customer to exchange for him nonregistered United States bonds for registered bonds; and it is bound by an agreement to that effect, made for a sufficient consideration, by its cashier. *Yerkes v. National Bank*, 69 N. Y. 382, 25 Am. Rep. 208.

74. Under Rev. St., § 5136, authorizing national banks to discount notes, drafts, bills of exchange, and other evidences of debt, a national bank has authority to take, hold, and sue on interest coupons, not under seal, attached to municipal bonds, each containing an express promise by the town to pay the amount thereof to bearer; such

§ 260 (6) Purchase and Discount of Negotiable Paper.—A national bank may discount and negotiate promissory notes and other evidence of debt.⁷⁵ This gives the power to acquire title thereto by purchase by way of discount,⁷⁶ but in no other way.⁷⁷ However, if it does not get the legal title to a note purchased in the market, it may maintain an action thereon, as the holder, against the maker and indorsers.⁷⁸ A national bank has power to purchase at a discount notes or bills of third persons owned by and available to one dealing with the bank, and is not confined to discounting a borrower's own paper.⁷⁹ It cannot deal in such paper for the purpose of private gain and profit alone.⁸⁰ A national bank has no power to purchase negotiable paper except from surplus capital.⁸¹ A national bank which itself purchased notes it had been authorized by the owner to sell to a third party, and which thus became, under general principles of law, liable for their value as for conversion, is not protected from such liability by the national banking act, even though it was not within its powers to act as agent for the sale of the notes.⁸²

§ 261. Effect of Acts Ultra Vires.—An ultra vires act of a national bank is not void but enforceable,⁸³ and can be objected to only by the United

coupons being an "evidence of debt" in the nature of a promissory note. *First Nat. Bank v. Bennington*, Fed. Cas. No. 4,807, 16 Blatchf. 53.

In an action by a national bank on railroad aid bonds, the United States alone can complain that the bank was not authorized to hold such bonds. *Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 So. 291.

75. Purchase and discount of negotiable paper.—Rev. St., § 5136.

Check payable to order or bearer.—Under St. U. S. 1864, c. 106, § 8, authorizing national banks to discount and negotiate promissory notes and other evidences of debt, such a bank may purchase checks, whether payable to order or bearer. *First Nat. Bank v. Harris*, 108 Mass. 514.

Draft accompanying bill of lading.—It is within the power of a national bank to buy a draft accompanying a bill of lading, the draft being drawn in favor of the bank by a seller of goods upon a buyer. *Union Nat. Bank v. Rowan*, 23 S. C. 339, 55 Am. Rep. 26.

76. Purchase by way of discount.—*First Nat. Bank v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341.

77. First Nat. Bank v. Pierson, 24 Minn. 140, 31 Am. Rep. 341.

78. Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

79. Smith v. Exchange Bank, 26 O. St. 141.

80. First Nat. Bank v. Pierson, 24 Minn. 140, 31 Am. Rep. 341.

81. From surplus capital.—"We are of opinion that this transaction was an out-and-out purchase by the bank, and that such purchase was without authority, and that the bank acquired no title to the note and can not recover thereon in this suit. While we do not mean that a national bank may not invest its surplus capital in notes, we are of opinion that it has no authority to use such surplus funds, as may remain on hand from day to day, for the purpose of buying notes. *First Nat. Bank v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341; *Farmers', etc., Bank v. Baldwin*, 23 Minn. 198, 23 Am. Rep. 683." *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355.

"If any other construction were given to such transaction as this, the intention of congress to prohibit national banks from buying and selling notes would be entirely defeated, and those institutions would be at perfect liberty to decline making discounts for their customers and afterward to buy up the very paper which had been offered for discount and refused, at such price as the bank might choose to give." *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355.

82. First Nat. Bank v. Anderson, 172 U. S. 573, 43 L. Ed. 558, 19 S. Ct. 284.

83. Effect of ultra vires.—*National Bank v. Whitney*, 103 U. S. 99, 26 L.

Ed. 443; *Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101; *Stewart v. National Union Bank*, Fed. Cas. No. 13,435, 2 Abb. U. S. 424; *Wymen v. Citizens' Nat. Bank*, 29 Fed. 734; *Gold Min. Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66; *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778; *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865, affirmed in 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878; *Emmerling v. First Nat. Bank*, 38 C. C. A. 399, 97 Fed. 739; *Williams v. American Nat. Bank*, 29 C. C. A. 203, 85 Fed. 376; *Richeson v. National Bank*, 96 Ark. 594, 132 S. W. 913; *Warner v. De Witt County Nat. Bank*, 4 Ill. App. 305; *Maples v. Scott*, 94 Ill. 379; *De Witt County Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 86; *First Nat. Bank v. Elmore*, 52 Iowa 541, 3 N. W. 547; *Mills County Nat. Bank v. Perry*, 72 Iowa 15, 33 N. W. 341; *Farmers' Nat. Bank v. Robinson*, 59 Kan. 777, 53 Pac. 762; *State Nat. Bank v. Flathers*, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; *Corcoran v. Bat-chelder*, 147 Mass. 541, 18 N. E. 420; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909; *Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058; *Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123; *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017; *Thornton v. National Exch. Bank*, 71 Mo. 221; *Wherry v. Hale*, 77 Mo. 20; *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000; *George v. Somerville*, 153 Mo. 7, 54 S. W. 491; *First Nat. Bank v. Shewalter* (Mo. App.), 134 S. W. 42; *Buchanan v. Saunders County Nat. Bank*, 4 Neb. 410, 94 N. W. 631; *First Nat. Bank v. Grosshans*, 61 Neb. 575, 85 N. W. 542; *Graham v. National Bank*, 32 N. J. Eq. 804; *Chapin v. Merchants' Nat. Bank*, 47 Hun 637, 14 N. Y. St. Rep. 272; *Oldham v. First Nat. Bank*, 85 N. C. 240; *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364; *Portland Nat. Bank v. Scott*, 20 Ore. 421, 26 Pac. 276; *O'Hare v. Second Nat. Bank*, 77 Pa. 96; *First Nat. Bank v. Smith*, 8 S. Dak. 7, 65 N. W. 437; *Cameron v. First Nat. Bank* (Tex. Civ. App.), 34 S. W. 178, affirming 23 S. W. 334; *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128. See ante, "Unauthorized Banking," §§ 7-11.

Overruled cases.—*Johnston v. Charlottesville Nat. Bank*, Fed. Cas. No. 7,425, 3 Hughes 657; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28

Am. Rep. 235; *First Nat. Bank v. Peirson*, 24 Minn. 140, 31 Am. Rep. 341.

Making excessive loan.—See post, "Who May Raise Question," § 269 (6b).

Loan of credit.—See ante, "Banking Powers in General," § 258.

Purchase of real property.—See ante, "Real Property," § 259 (1a).

Taking real property as security.—See ante, "As Security for Debt," § 259 (1ab).

Taking chattel mortgage as security.

—A national bank which, to secure its claims, takes possession, by its cashier, of "goods under a chattel mortgage, and disposes of them, can not claim immunity from liability for any surplus remaining after payment of its claims, on the ground that its cashier, being an officer of a national bank, exceeded his powers, and acted ultra vires. *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937.

Purchasing notes.—A recovery by a national bank upon promissory notes purchased by it can not be defeated by the plea that such purchase was ultra vires. *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849, 53 Am. Rep. 5, overruling *First Nat. Bank v. Pierson*, 24 Minn. 140, 31 Am. Rep. 341.

Want of authority in plaintiff national bank to purchase a negotiable note can not be pleaded by the maker of the note in defense. *First Nat. Bank v. Smith*, 8 S. Dak. 7, 65 N. W. 437.

Even if, under St. U. S. 1864, c. 106, § 8, authorizing national banks to "discount and negotiate" notes, the purchase of a note by such a bank is ultra vires, it is an ordinary contract, not being made penal or expressly forbidden, and the maker or indorser can not defend on the ground that the bank has acquired no title. The violation of the law can be availed of only in proceedings against the bank, in the interest of the public, to deprive it of its charter. *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

Discounting nonnegotiable note.—It is no defense to the maker of a non-negotiable note, discounted with a national bank, that such banks have no right to deal in that kind of paper. *First Nat. Bank v. Gillilan*, 72 Mo. 77.

Purchase of tax bill.—Even if it appeared that the act of plaintiff national bank in acquiring title to the special tax bill sued on was ultra vires, such fact would be no defense, the purchase being only voidable, and its validity

being assailable only in a direct proceeding by the government. *First Nat. Bank v. Shewalter* (Mo. App.), 134 S. W. 42.

Certifying check without deposit.—Rev. St., § 5208, which makes it unlawful for any national bank to certify any check unless the drawer has on deposit money sufficient to meet the same, but declares that a check so certified shall be a valid obligation against the bank, does not, as between the parties, invalidate a pledge of bonds made by the drawer of such checks to secure the indebtedness thereby created from him to the bank, when the transaction has been completed by payment of the checks. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66.

Plaintiff's testator deposited with a firm of brokers certain bonds as margins for purchases of stocks, and the brokers, without his knowledge, delivered them to a bank under a standing agreement, previously made, that, if the brokers became indebted to the bank, it might at any time, in its discretion, sell any collateral held by it to secure such debt. On the day of the pledge, but not in pursuance of any agreement made at the time of receiving the bonds, the bank, on the faith of the bonds, certified and subsequently paid certain checks drawn by the brokers. The bank took the bonds in good faith, without notice of the testator's title. Held, that the bonds were a valid security for the debt created by the certified checks, notwithstanding that the certification was in violation of Rev. St., § 5208, which makes it unlawful for any national bank to certify any check unless the person drawing the same has on deposit sufficient money to meet it; and plaintiff could not recover the bonds without first paying the debt. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66, affirming 113 N. Y. 325, 21 N. E. 57.

Certifying noncommercial paper.—Where the president and cashier of a bank had no authority to certify a noncommercial instrument, by which the drawers sought to indemnify their surety on a building contractor's bond for any liability the surety might sustain by virtue of such bond, the bank was not estopped to plead that the certification of such instrument was ultra vires and void. *Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782.

Acquiring or dealing in stock.—See ante, "Acquiring or Dealing in Stock of Other Corporations," § 260 (2).

Acquiring share in partnership.—See ante, "Banking Powers," § 258.

Acting as agent in sale of bonds, notes, etc., where a cashier of a national bank bought and sold stocks for customers in the name of the bank, with the knowledge of the directors, the bank is liable for stocks embezzled by the cashier, though the bank was unauthorized to deal in stock. *Searle v. First Nat. Bank (Pa.)*, 2 Walk. 395.

A national bank which assumed to sell for another certain notes owned by him, but which, instead of selling them to a third person, without his knowledge sold them to itself, violated its duty to the owner, the same as if it had full power under the law to act as such agent; and was, therefore, guilty of a conversion of such notes, notwithstanding its agency was ultra vires. *Anderson v. First Nat. Bank*, 5 N. Dak. 451, 67 N. W. 821.

But it has been held that in an action of deceit against a national bank to recover damages for the alleged false representations of its teller in the sale to the plaintiff of certain railroad bonds, held, that the selling of railroad bonds on commission was not within the authorized business of a national bank; and, being thus beyond the scope of its corporate powers, the defense of ultra vires was open to it. *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

Acting as agent to pay, invest or collect money.—A national bank can not escape liability to a depositor for money which he placed in its hands by pleading that it made with him an ultra vires agreement to pay out the money to some third person on deposit of collaterals for his benefit, when the evidence shows it paid out the money without taking the collaterals agreed on. *First Nat. Bank v. Henry*, 159 Ala. 367, 49 So. 97.

The cashier of a national bank, on behalf of the bank, received a deposit under the agreement that it was to be invested by the bank in stocks and bonds for the benefit of the depositor. Held, that the bank was liable for the return of the money, notwithstanding the agreement on which it was received may have been ultra vires; and the fact that the cashier embezzled the money does not affect the banker's liability. *L'Herbette v. Pittsfield Nat.*

States in a direct proceeding to forfeit the bank's charter.⁸⁴ Ultra vires is not a defense to an action by⁸⁵ or against⁸⁶ the bank.

By Whom Pledged.—The United States government alone, in an action to forfeit its charter, can complain of an ultra vires act of a national bank, where such act is not absolutely void.⁸⁷ A prior indorser to a note purchased by a bank can not set up the defense of ultra vires.⁸⁸ Where a contract by which a national bank assumed all the obligations of an insolvent bank was fully explained to and ratified by a proportion of the stockholders exceeding the number required by statute present and voting, the stockholders can not thereafter claim the contract was ultra vires.⁸⁹ The receiver of a na-

Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

The fact that a contract made by a national bank to receive and collect securities and reinvest the proceeds for the owner contained provisions which were ultra vires does not relieve the bank of the legal obligation to return the securities or account to the owner for their value. *Emmerling v. First Nat. Bank*, 38 C. C. A. 399, 97 Fed. 739.

Acting as agent to procure insurance.—In an action for breach of an agreement by a national bank to procure a person applications for insurance, if he would procure for it a customer, the bank may set up the defense of ultra vires. *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567.

Conducting warehouse.—A national bank, having taken as security for a pre-existing debt a conveyance of a warehouse or elevator for storing grain, placed parties in charge to continue the business as its agents. A., who held a receipt from former custodians of the elevator for a certain quantity of grain stored therein, and mixed, as was customary, with other grain of the same quality, made a demand on the bank therefor, and, delivery of the same being refused, brought suit for its conversion. It appeared that when the bank took possession of the elevator there was enough grain therein of the kind described in A.'s receipt to cover all receipts for such grain then outstanding. Held, that the bank had power to take the elevator as security for its debt, and, even admitting that carrying on the warehouse business was ultra vires, still it was its duty to hold the grain therein for the proper owners, and that it was, therefore, liable. *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630.

Shipment and sale of whiskey.—A

bank is liable to the owner of a lot of whiskey intrusted to it for shipment and sale, for the proceeds, independently of the question whether national banks are by their charters authorized to sell produce on commission. *First Nat. Bank v. Priest*, 50 Ill. 321.

Holding deposit as security for performance of contract.—The act of a national bank in accepting a deposit to be held by it as collateral security for the performance of a contract between the depositor and another is not illegal, and it would be estopped to set up the defense of ultra vires against one making such a contract with it relying thereon. *Bushnell v. Chautauqua County Nat. Bank*, 10 Hun 378, affirmed in 74 N. Y. 290.

84. See post, "Forfeiture of Franchise and Dissolution," § 284.

85. As offense to action.—*National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Voltz v. National Bank*, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155, affirming 57 Ill. App. 360; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235.

86. *First Nat. Bank v. Henry*, 159 Ala. 367, 49 So. 97; *Richards v. Kountze*, 4 Neb. 200.

87. By whom pledged.—See ante, "Effect of Acts Ultra Vires," § 261.

88. Prior indorser.—*Atlas Nat. Bank v. Savery*, 127 Mass. 75.

The fact that the purchase by a national bank, of a promissory note from an indorsee was ultra vires, does not prevent the bank from maintaining in its own name an action against a prior party thereto. *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235.

89. By stockholders.—Where a contract by which a national bank assumed all the obligations of an insolvent bank in contemplated liquidation was fully explained at a meeting at

tional bank succeeds to no right beyond those which could have been enforced by the bank, its stockholders or creditors. He is not entitled to have a contract made by the bank, and which has been executed, set aside on the ground merely that it was *ultra vires*.⁹⁰

Against Whom Ultra Vires May Be Pleaded.—Where notes secured by mortgages on land have been assigned to a national bank, and by it to a bona fide purchaser, the latter is entitled to enforce the security, even though the bank could not have done so, as in case the assignment to it was for other than a debt previously contracted.⁹¹

Doctrine of Pari Delictum.—A national bank, which has purchased notes, and paid therefor, with the intention to taking title thereto, can not recover back the money on the ground that the purchase was *ultra vires*.⁹²

Doctrine of Estoppel.—The doctrine of estoppel applies to a voidable⁹³ but not to a void⁹⁴ *ultra vires* act of a national bank.

From Acceptance of Benefits.—Where the *ultra vires* act of the bank is not void but merely voidable, the bank is estopped by its acceptance of benefits thereunder to claim exemption from liability.⁹⁵ But if the *ultra*

which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by Rev. St., §§ 5220, 5221 [U. S. Comp. St. 1901, p. 3503], the stockholders were not thereafter entitled to claim that such contract was *ultra vires*. *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

90. By receiver of bank.—A receiver of a national bank can not maintain a suit against a third party, based upon the alleged invalidity, as *ultra vires*, of a contract made by the bank which was fully executed ten years prior to his appointment, and to which no objection was made at the time, either by the United States or by any stockholder. Decree 112 Fed. 577, affirmed. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558. See *an'e*, "Right to Improve Property," § 259 (2).

91. Against whom ultra vires may be pleaded.—*Richards v. Kountze*, 4 Neb. 200.

Such security is enforceable by the bank. See *ante*, "As Security for Debt," § 259 (1ab).

92. Doctrine of pari delictum.—*Atleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Chapin v. Merchants' Nat.*

Bank, 47 Hun 637, 14 N. Y. St. Rep. 272.

93. Doctrine of estoppel.—*Fidelity, etc., Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782.

94. Void act.—*California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782.

An act of a national bank, void because *ultra vires*, can not be made good by estoppel. *Merchants' Bank v. Baird*, 160 Fed. 642.

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. *California Nat. Bank v. Kennedy*. 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831.

When a national bank enters into a contract which is beyond its powers, it can not be estopped from pleading *ultra vires* by the performance of the contract by the other party. *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059.

95. Doctrine of acceptance of benefits.—*Logan County Nat. Bank v.*

vires act is absolutely void it can not be ratified by the acceptance of benefits

Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. Ed. 907; *Merchants' Nat. Bank v. State Nat. Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008; *National Bank, etc., Co. v. Petrie*, 189 U. S. 423, 47 L. Ed. 879, 23 S. Ct. 512.

Under authority to sell notes as agent.—Where a national bank was found to have itself purchased notes, which the owner had authorized it to sell to a third party, on general principles of law, it was held liable for their value as for a conversion, even though it was not within its powers to sell them as the owner's agent. *First Nat. Bank v. Anderson*, 172 U. S. 573, 43 L. Ed. 558, 19 S. Ct. 284.

Under illegal sale of bonds.—In an action to recover money paid to a national bank for certain bonds, it can not set up in its answer that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void, the ground of the action being that the sale was induced by false representations of the president of the bank. *National Bank, etc., Co. v. Petrie*, 189 U. S. 423, 47 L. Ed. 879, 23 S. Ct. 512.

Under agreement to deliver bank's own shares.—Act Cong. June 3, 1864, § 36, prohibiting a national bank from making loans on security of shares of its own stock, or from purchasing such shares unless in certain contingencies, does not preclude a recovery for the value of certain shares of stock, which such a bank contracted to give plaintiff for acting as director and doing business with the bank where the bank has received the benefit of the contract. *Rich v. State Nat. Bank*, 7 Neb. 201, 29 Am. Rep. 382.

Under agreement to resell bonds to vendor.—Though the National Bank Act does not authorize a bank to enter into a contract to buy certain bonds and return them to the seller at the purchase price, yet when the amount which it paid for the bonds is tendered back to it, and their surrender demanded, its authority to retain them no longer exists; and the fact that the contract under which it obtained them may be illegal will not prevent the seller from maintaining an action for their value, as such action is not in affirmance of the contract, but in disaffirmance of it, and to prevent the bank from retaining the ben-

efit which it has derived from its unlawful act. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496, affirming 3 S. W. 122.

Under contract of guaranty.—Where a national bank warranted to another bank payment of a loan made to an individual in order that the national bank might obtain from the amount loaned a sum in which the individual was indebted to it, conceding that the guaranty was ultra vires, it was liable thereon to the amount actually received by it under the transaction. Judgment 119 App. Div. 889, 105 N. Y. S. 1105, reversed. *Appleton v. Citizens' Cent. Nat. Bank*, 190 N. Y. 417, 83 N. E. 470.

A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statutes. Judgment, *Appleton v. Citizens' Cent. Nat. Bank*, 190 N. Y. 417, 83 N. E. 470, affirmed. *Citizens' Cent. Nat. Bank v. Appleton*, 216 U. S. 190, 54 L. Ed. 443, 30 S. Ct. 364.

Where a national bank has received benefit from a contract by one of its officers guarantying a building contract between third persons, an action may be maintained against the bank for recovery to the extent of such benefit. *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 335.

Under loan of bank's credit.—A national bank, which has received and retained the benefits resulting from its contract to pay for goods sold on its credit and delivered to a depositor in pursuance of the contract, can not avoid liability thereon on the ground that the contract was ultra vires. *First Nat. Bank v. Greenville Oil, etc., Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828.

Acceptance of trust funds.—Where a national bank took over the operation of a creamery corporation which was largely indebted to it, and continued the operation of the creamery until a receiver was appointed for the bank, at which time it held certain funds actually identified in trust for the

by the bank.⁹⁶ The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, being void, can not be ratified, and therefore the bank is not estopped to deny its liability for the debts of said corporation, though it has received dividends on the stock.⁹⁷ And it has been held that an agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction; such securities having been received by such maker as trustee for the bank.⁹⁸

On Action to Rescind Contract.—In an action to rescind for fraud a contract as a part of which a national bank agreed to discount notes and renew them from time to time until they were discharged as provided, it was immaterial whether the agreement by the bank was beyond its powers under the federal statutes; the action being not to enforce, but to rescind, the contract.⁹⁹ A national bank, having joined with other persons in a partnership to operate a mill, can not be prevented from recovering moneys loaned to the firm, on the ground that it had no power to become a partner in a mill.¹ But it has been held that the bank is in the position and subject

patrons of the creamery, it was no answer to the receiver's obligation to pay over such funds that the bank had no power to engage in the creamery business. *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128.

96. Act absolutely void.—*De La Vergne, etc., Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 65, 20 S. Ct. 20; *First Nat. Bank v. Converse*, 200 U. S. 425, 440, 50 L. Ed. 537, 26 S. Ct. 306.

Where the case is not one of irregularity of organization, or of abuse of a legal power, but of an attempt to exercise a power expressly prohibited by statute, the lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbids the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, can not be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433, reaffirmed in *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782.

97. Purchase of corporate stock.—*California Nat. Bank v. Kennedy*, 167

U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739, reversing 79 Fed. 51.

"The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by an act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified." *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831, reaffirmed in *Shaw v. National German-American Bank*, 199 U. S. 603, 50 L. Ed. 328, 26 S. Ct. 750; *McCreery Realty Corp. v. Equitable Nat. Bank*, 203 U. S. 584, 51 L. Ed. 328, 27 S. Ct. 782. See ante, "Acquiring or Dealing in Corporate Stock," § 260 (3).

98. *Tillinghast v. Carr*, 82 Fed. 298.

99. *Baker v. Berry Hill Mineral Springs Co.*, 109 Va. 776, 65 S. E. 656.

1. *Cameron v. First Nat. Bank* (Tex. Civ. App.), 34 S. W. 173, affirming 23 S. W. 334.

to the liabilities of a wrongdoer, if it exceeds its authority. Where a national bank buys notes, and pays for them, it can not rescind the contract thus fully performed and executed, on the ground that it was a purchase which the bank had no authority to make, and recover back the money paid on it.²

§ 262. Representation of Bank by Officers—§ 262 (1) Power of Bank to Entrust Authority to Its Agents.—It is well settled that a national bank has power under the banking laws of the United States to entrust to its agents such authority as is required to meet all of the legitimate demands of its authorized business, and to enable it to conduct its affairs within the general scope of its charter safely and prudently.³ By § 5136 of the United States Revised Statutes, power is expressly granted to each national bank to "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking," and the section precedes further to enumerate certain powers.⁴ What is the proper business of a bank, and what incidental powers may be necessary to carry on the business of banking is not purely a question of law, nor altogether a question of fact. It is a mixed question of law and fact, depending, as to fact, upon circumstances and location.⁵ Section 5136 is not to be so strictly construed as to limit the incidental powers to precisely the things specified in such section.⁶

§ 262 (2) When Officer Regarded as Representing Bank—§ 262 (2a) As Dependent upon Scope or Apparent Scope of Duties—§ 262 (2aa) In General.—It may be stated as a general rule that the act of an officer of a bank, to be binding upon the bank, must be done within the ordinary course of his duties.⁷ Persons dealing with a bank are presumed

2. *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339.

3. **Power of bank to confer authority upon agents.**—*Ricker Nat. Bank v. Stone*, 21 Okl. 833, 97 Pac. 577; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320.

4. **Provision of United States Rev. Stats., § 5136.**—*Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

5. **Determination as to proper business of bank and incidental powers, etc.**—*Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed in *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

6. *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

7. **General rule as to power of officer to bind bank by his acts.**—*United States v. City Bank (U. S.)*, 21 How.

356, 16 L. Ed. 130; *Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716.

Acts of director or agent within scope of authority binding on bank.—*Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *Washington Bank v. Lewis (Mass.)*, 22 Pick. 24.

Unauthorized to receive other than money in payment of note.—An officer of a national bank has no authority to agree to receive anything but money in payment of a nonnegotiable note indorsed to it. *First Nat. Bank v. Alexander*, 152 Ala. 585, 44 So. 866; *Bank v. Hart*, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479.

The receiving securities or other property as custodian or bailee, either gratuitously or for hire, is not within the ordinary business of a banking corporation, organized under the United States National Currency Act of 1864 (13 Stat. 99), and it is not within the scope of the general powers

to know the extent of the general powers of its officers.⁸ And if a person enters into a business transacted with a national bank, he is bound to take notice of the nature and extent of its corporate powers, and of the purposes for which it was organized; and if the transaction in question is in excess of those powers he has no right to presume without inquiry that a guaranty executed by its cashier, or by any other officers, in the course of such transaction is executed with the sanction and approval of the corporation. No act done by an officer of an incorporated company in furtherance of a business venture which is outside of the company's corporate powers can be said to be an act which is within the scope of the apparent or customary powers of such officers, and to be binding upon the corporation for that reason.⁹ A bank may well be held responsible to a third party for an act done by its officer in the prosecution of the legitimate business of the bank which was within the apparent scope of his powers, although it was in fact unauthorized by the corporation.¹⁰ A bank may also be held responsible to a third party for a wrongful and unauthorized act of its officer, which has the appearance of being within the scope of his ordinary duties, and not ultra vires, although by reason of some extrinsic fact, such as the purpose for which the act is done, which is unknown to the party with whom he deals, the act done is in excess of the legitimate functions of the corporation.¹¹ But when the transaction in which a bank is, for the time being, engaged is known to the person dealing with it to be outside of the legitimate sphere of its operations, no reason is perceived why a person dealing with the officer under such circumstances should be allowed to indulge in any presumptions as to his authority. He is advised by the very nature of the transaction that all acts done and performed in relation thereto are beyond the power of the corporation, and if he expects to hold the corporation liable in any contract or obligation entered into by the officer in the course of that transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body.¹² It has been held, however,

or apparent authority of the executive and ministerial officers of such a corporation to bind the corporation by a contract for such a bailment. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

8. Persons dealing with bank charged with notice of general powers of officers.—*Western Nat. Bank v. Armstrong*, 83 Fed. 556. See also, *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

9. *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

10. *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

11. *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129; *Farmers', etc., Bank v. Butchers, etc.,*

Bank, 16 N. Y. 125; *Houghton v. First Nat. Bank*, 26 Wis. 663.

In absence of evidence that the president and cashier of a national bank were agents of a depositor in transferring to their account money of the depositor, which they agreed to loan on real estate, and that the depositor knew they were acting for her in that capacity, the bank and its receiver are liable for her funds so transferred, though it could not loan on such security. *Short v. Butler*, 136 Mo. App. 356, 117 S. W. 114.

12. *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345; *First Nat. Bank v. Graham*, 79 Pa. 106, 21 Am. Rep. 49.

that a well-known usage, by which an executive officer of a bank exercises authority to do acts on its behalf which otherwise could only be done by the directors, is equivalent to a specific delegation of authority by the boards.¹³ Where the entire control of the affairs of a banking corporation has been abandoned to one of its officers, it will be presumed that he is authorized by the corporation to do any act that the corporation might lawfully do, and the acts of such officer in transacting the business of the corporation need no authorization or ratification from a nominal board of directors.¹⁴

§ 262 (2ab) Applications of Rules.—Powers of Directors.—The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit; and therefore the as-

13. Usage as equivalent to delegation of authority by boards of directors.—*Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The borrowing of money on behalf of a national bank from its correspondent by one of its officers is ratified by the passing without objection of a monthly statement of the lending bank, showing the loan, and sent according to usage, where such statement was received by employees who were not concerned in making the loan. Decree, *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed. *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The conduct of the directors of a national bank in permitting the vice president to exercise full control and management of its business, and use its funds in his private speculations without inquiry or investigation, held to authorize him to borrow money on behalf of the bank. Decree, *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed. *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

In an action by the receiver of an insolvent national bank against a correspondent of the bank to recover money deposited by the bank with its correspondent, the evidence showed that the directors of the bank left it to the president to negotiate loans, and to make such contracts as to repayment and security as were lawful and usual. Held, that the evidence was sufficient to establish the president's authority to pledge the deposit with

the correspondent as security for loans made by the latter. *Bell v. Hanover Nat. Bank*, 57 Fed. 821.

"In *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428, the issue was whether a bank was bound by the act of its cashier in having canceled obligation of its debtor, secured by a first lien on his property, in exchange for a partial payment on them and new obligations secured by a second lien. It was conceded by the court that the ordinary powers of a cashier do not include the release of security and the canceling of any obligation due the bank, except upon payment; but Mr. Justice Harlan, delivering the opinion of the court, set out at some length the circumstances, to show that, in fact, the whole business of the bank had been delegated to the cashier by the directors, whose supervision over him was most perfunctory, and who were very little in the bank, and that, if the directors did not abdicate all authority as such, they acquiesced in the cashier's assumption of exclusive management of the bank's business, and held that the directors and the bank could not be heard to deny the requisite authority in the case in hand." *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556.

14. Tourtelot v. Whithed, 9 N. Dak. 407, 84 N. W. 8, citing *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

Where the board of directors of a national bank expressly authorized, or for a reasonable time permitted, the president to participate in the actual management of its daily business affairs, his authority to discount commercial paper and to do other acts within the authority of ministerial officers is ample. *Rankin v. Tygard*, 198 Fed. 795.

sent of a majority of the individual members of the board, acting separately and singly, is not the assent of the bank, and is not binding upon it.¹⁵

Powers of Executive Officers.—It is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use.¹⁶ Many cases have arisen in which the discounting bank has sought to recover from another bank on notes signed personally by one of the executive officers, on the ground that, notwithstanding the personal signature, the law was really made for and in the interest of the bank itself.¹⁷ One of the tests of liability in such cases is, whether the loan was made for the benefit of the bank or of the individual officer; and this has often been determined by ascertaining which party in fact received the benefit of the loan or whether the bank subsequently ratified the loan as its own.¹⁸ A

15. Powers vested in directors as a board.—First Nat. Bank *v.* Drake, 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

A bond to a national bank conditioned to take effect on the date of its approval by proper authority took effect on its approval by all the directors, though not by a majority at a meeting of the board, and its receipt and preservation by an officer of the bank. Rankin *v.* Tygard, 198 Fed. 795.

16. Power of executive officers to borrow money.—Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346.

17. Liability of bank for moneys borrowed on notes signed personally by executive officers thereof.—Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346.

18. Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346; Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498; Armstrong *v.* Chemical Nat. Bank, 27 C. C. A. 601, 83 Fed. 556; American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. 152; Carroll *v.* St. John's, etc., Mut. Relief Soc., 125 Mass. 565; Melledge *v.* Boston Iron Co. (Mass.), 5 Cush. 158, 51 Am. Dec. 59.

The president of a national bank discounted his note with a correspondent bank under an agreement by which the latter placed the proceeds to the credit of his own bank in a special account which was not subject to check, but was to be held to meet the

note at its maturity. The books of his bank showed the amount as a deposit in its general account with the correspondent, the purpose being to deceive the examiner. On the failure of his bank the correspondent charged the note to the special account in accordance with the agreement. Held, that the amount to the credit of the insolvent bank in such amount did not in fact belong to it, but remained the property of the pretended lender; the whole transaction being merely a subterfuge, and that its application to the payment of the note was not a conversion. Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346.

If the transaction be regarded as a real, and not a pretended, loan, it was one made for the benefit of the borrowing bank, and not of its president, and its application to the payment of his note, which was in reality that of the bank, was within the right of the lender. Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346.

"The appropriation by the defendant of the money in question for the purposes of canceling the notes representing the so-called loans was in pursuance of an agreement between the two banks to that effect, and did not amount to conversion." Cherry *v.* City Nat. Bank, 75 C. C. A. 343, 144 Fed. 587, affirming Rankin *v.* City Nat. Bank, 208 U. S. 541, 52 L. Ed. 610, 28 S. Ct. 346, citing Bell *v.* Hanover Nat. Bank, 57 Fed. 821; Scott *v.* Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; Judy *v.* Farmers', etc., Bank, 81

president of a national bank, or the vice president who is the acting president, may, in conformity with the established custom, without special authority from the board of directors, borrow money on behalf of the bank from another bank.¹⁹ From the nature and necessities of the business of banking, and the constantly occurring incidencies of emergencies when success or failure in the conduct of the particular transaction depends upon the executive ability, the judgment and the decision of the officer representing the bank, in reference to points which could not have been anticipated and which must be promptly and without hesitation settled, it is evident that a large discretion must be vested in such officers.²⁰ To require special authority for their acts would so embarrass the conduct of the business as to seriously interfere with, if not entirely prevent, the prosperous conduct of its affairs. Hence, such officers stand among the highest in the rank of general agents. Their position warrants the implication of the authority

Mo. 404; *Bushnell v. Chautauqua County Nat. Bank*, 74 N. Y. 290; *Coats v. Donnell*, 94 N. Y. 168.

19. Authority of president or vice president to borrow money.—*Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed in *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498; *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129; *United States Nat. Bank v. First Nat. Bank*, 24 C. C. A. 597, 79 Fed. 297; *Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 482, 109 Fed. 421; *Fleckner v. Bank* (U. S.), 8 Wheat. 338, 5 L. Ed. 631; *Wild v. Bank*, Fed. Cas. No. 17,646, 3 Mason 505; *Merchants' Bank v. State Bank* (U. S.), 10 Wall. 604, 19 L. Ed. 1008; *Bank v. Wheeler*, 21 Ind. 90; *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Cooks v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

Where, by general usage between correspondent banks, money is frequently borrowed by one from another—the executive officers of the borrowing bank acting in its behalf, and no other authority being furnished or demanded—the directors of a national bank will be presumed to have knowledge of such usage; and in the absence of contrary provision, or notice to its correspondents, its vice president is authorized to borrow money from a correspondent on its behalf. *Decree, Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed. *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirmed *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The president of a national bank, who has the actual management of its operations, is authorized to procure the discount of its paper. *Hanover Nat. Bank v. First Nat. Bank*, 48 C. C. A. 482, 109 Fed. 421.

The president of a national bank, who owned a majority of its stock, and exercised full control of its affairs, with the acquiescence of the directors obtained a loan for the bank at a time when it was in fact insolvent, though it was not known or believed to be so by the lender. As security the president executed a deed to the bank building and lot; producing what purported to be a certified copy of the minutes of the action of the board of directors authorizing the conveyance, though no such action had in fact been taken. Held, that it being consistent with the course of decision in the state, the deed, though insufficient as a legal conveyance by the bank, would be upheld as an equitable mortgage. *Stapylton v. Stockton*, 33 C. C. A. 542, 91 Fed. 326.

The receiver of an insolvent national bank is liable for money borrowed by the president of the bank without special authority, when it appears that the bank actually received the money and appropriated it to its own use. *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572, distinguished. *Blanchard v. Commercial Bank*, 21 C. C. A. 319, 75 Fed. 249.

20. Discretionary powers of president or vice president acting as president.—*Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirmed in *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

necessary to the performance of their duties.²¹ The president of a national bank has power, by virtue of his office, to compromise or reduce a debt due the bank.²² The president of a national bank, also its general agent and manager, may purchase real estate for the bank to secure payment of suspended paper or a doubtful debt, in order to save the debt, or a portion of it, from loss.²³ The authority of the president of a national bank to guaranty notes of third parties, held and sold by the bank, will be presumed in favor of a purchaser without notice to the contrary.²⁴ An agreement made by the president or cashier of a national bank to indemnify the indorser of a draft for the bank's accommodation is binding upon the bank.²⁵ Under Rev. St. U. S., § 5136, subd. 4, authorizing national banks "to sue and be sued, complain and defend in any court of law or equity, as fully as natural persons," such banks have power to employ attorneys to prosecute or defend suits, and the president may agree as to their compensation.²⁶ The president of a national bank has not necessarily, by virtue of his office, power to draw checks against an account kept by his bank with another bank.²⁷ Under the national banking law, which authorizes banks to elect boards of directors to which are committed the management and control of the bank, and which are empowered to select one of their number as president, in the absence of any by-law or any other fact extending the authority of the president elected by the directors, a statement by him that a note which was in fact a forgery was properly signed by the purported signer is without authority from the bank and not binding upon it.²⁸ The rule that no agent of a corporation has the implied authority to give away any portion of the corporate property or to create a gratuitous corporate obligation, binding on

21. *Chemical Nat. Bank v. Armstrong*, 76 Fed. 339, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The rule announced in *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572, that the vice president or cashier of a national bank has no power to borrow money on its behalf unless specially authorized by the directors, is not applicable in a case where a general and long-established usage is shown between corresponding banks, prevailing in both cities where the lending and borrowing banks were respectively situated, of lending and borrowing through the executive officers of the banks, no further authority being furnished or demanded; the presumption being that such usage was known and acquiesced in by the directors of the borrowing bank, in the absence of notice to the contrary to its correspondents. *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirming *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

22. **Power of president to compromise or release debt due bank.**—*Farmers' Nat. Bank v. Templeton* (Tex. Civ. App.), 40 S. W. 412.

23. **Purchase of real estate to save debt, etc.**—*Libby v. Union Nat. Bank*, 99 Ill. 622.

24. **Presumption as to authority to guaranty notes of third parties.**—*Thomas v. City Nat. Bank*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263.

25. **Agreement to indemnify indorser for bank's benefit.**—*First Nat. Bank v. Sullivan* (Pa.), 11 Wkly. Notes Cas. 362.

26. **Employment and compensation of attorneys to prosecute or defend suits.**—*National Bank v. Earl*, 2 Okl. 617, 39 Pac. 391.

27. **Power to draw checks on account kept with another bank.**—*Putman v. United States*, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923.

28. **Statement by president as to signature of note.**—*Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879, reversing 77 S. W. 239.

the corporation applies to the president of a national bank, as, for instance, in the matter of subscribing money for the bank, etc.²⁹ The duties of a cashier are strictly executive and ministerial; he is the agent of the board of directors,³⁰ and his acts in order to bind the bank, must be within the apparent scope of his authority unless directly authorized by the bank.³¹ The cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties.³² The cashier of a bank may not pledge the credit of the corporation or use the corporate assets for the satisfaction of his individual indebtedness, without the consent of the board of directors. That is a use foreign to the charter purposes of the corporation; and, because such conduct falls outside the scope of a cashier's lawful authority, any one dealing with him privately must do so at his peril.³³ So long as a national bank confines itself to the kind of business which it is authorized to transact, one who has dealings with it is entitled to presume, unless he has notice to the contrary, that its cashier is empowered to draw and certify checks and drafts, to transfer by indorsement commercial paper of all kinds which is in the bank's possession, to guaranty the payment of notes or bills which the bank secures or rediscounts for

29. The president of a national bank has no authority to subscribe money for the bank on condition that certain parties would erect a paper mill in the town. *Robertson v. Buffalo County Nat. Bank*, 40 Neb. 235, 58 N. W. 715.

30. General powers and duties of cashier.—*Crawford v. Boston Store Mercantile Co.*, 67 Mo. App. 39.

31. United States v. City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; *Sandy River Bank v. Merchants', etc., Bank*, Fed. Cas. No. 12,309, 1 Biss. 146; *Crawford v. Boston Store Mercantile Co.*, 67 Mo. App. 39; *Bank v. Hart*, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479.

Where the cashier of a national bank, in his official capacity, draws checks on the bank's correspondent in favor of his own creditor, and to be applied to his individual use, the payee will be liable to the bank for the money thus wrongfully applied, unless authority to the cashier to so apply the bank's funds is affirmatively shown. *Kissam v. Anderson*, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

32. Cashier as representative of bank.—*Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

B. was cashier of plaintiff, a national bank, and was also a member of the firm of B. & C. Plaintiff had discounted more paper for B. & C. than the law permitted, and B. asked defendant to execute his note to B. & C., with which

to retire the notes of B. & C. then held by plaintiff, stating that the bank examiner was expected soon, and promising that defendant would never be called upon to pay it. It did not appear that the bank officers knowingly made the excessive loan. Held, that the facts constituted no defense to an action on the note, which was evidently given for the accommodation of B. & C., as B. was acting for them, and not for the bank. *Allen v. First Nat. Bank*, 127 Pa. 51, 17 Atl. 886, 14 Am. St. Rep. 829.

33. Pledge of bank's credit or use of corporate assets to satisfy individual debt.—*Cobe v. Coughlin Hardware Co.*, 83 Kan. 522, 112 Pac. 115, quoting from *Hier v. Miller*, 68 Kan. 258, 75 Pac. 258, 75 Pac. 77, 63 L. R. A. 952.

Neither the cashier of a national bank nor a member of the discount board owning a majority of the stock, nor the two conspiring together, can give away the funds of the bank, nor use them to pay their individual debts, and if they conspire to pay the stockholder's debt by the entry of credits on the bank books in favor of his creditor based on fictitious notes, and the creditor checks out the amount of the credit without the sanction of the directors, the creditor is liable to the bank for the money so drawn, though he may have had no knowledge of the fraud of the officers. *Cobe v. Coughlin Hardware Co.*, 83 Kan. 522, 112 Pac. 115.

its own benefit, and to do many other acts which might not be specially numerated.³⁴ The cashier of a national bank is presumed to have the same authority as cashiers of other banks of discount in respect to receiving evidences of debt for collection.³⁵ These are acts which cashiers customarily do and perform, and persons dealing with them, without notice of any limitation of their powers, may properly assume without inquiry that they have the right to do such acts and to exercise such powers.³⁶ This doctrine has, however, no application in those cases where a bank is known to be carrying on a kind of business which is not authorized to transact.³⁷ The ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way.³⁸ Ordinarily, he has no power to discharge a debtor without payment, nor to

34. Presumption as to authority of cashier to perform acts within scope of apparent or customary powers.—*Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

Indorsement of bank's paper.—As to the outside world and persons dealing with a national bank, its cashier is its authorized agent to indorse negotiable paper owned by the bank, and the bank is not relieved from liability as indorser of a note by reason of the fraud of the cashier, unless the indorsee had notice of the fraud. *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329.

A cashier of a national bank has authority to indorse a note which the bank has received in its usual course of business. *Blair v. First Nat. Bank*, Fed. Cas. No. 1,485, 2 *Flip.* 111.

Certification of checks.—The National Bank Act (Act June 3, 1864 [13 Stat. 99]), conferred no authority upon the cashier of a national bank to certify checks. *Merchants' Nat. Bank v. State Nat. Bank*, Fed. Cas. No. 9,449, 3 *Cliff.* 205, reversed in 10 *Wall.* 604, 19 L. Ed. 1008.

Acceptance of deed on behalf of bank.—The cashier, a bank's agent in general routine business, accepted a deed in its behalf, which by grantor's direction he placed on record. Held, an acceptance by the bank. *Hall v. Farmers', etc., Bank*, 145 Mo. 418, 46 S. W. 1000.

35. Receipt of evidences of debt for collection.—*Hanson v. Heard*, 69 N. H. 190, 38 *Atl.* 788.

36. People's Bank v. Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907; *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129; *Merchants' Bank v. State Bank* (U. S.), 10 *Wall.*

604, 19 L. Ed. 1008; *Fleckner v. Bank* (U. S.), 8 *Wheat.* 338, 5 L. Ed. 631; *Wild v. Bank*, Fed. Cas. No. 17,646, 3 *Mason* 505; *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 *Am. Rep.* 667; *Houghton v. First Nat. Bank*, 26 *Wis.* 663.

Where the cashier of a national bank, who was also a director of an insurance company, received several notes, aggregating \$25,000, from subscribers to the stock of the insurance company, entered them on the books of the company as discounted paper, and passed them to their face value to the credit of the insurance company, a personal agreement by the cashier with the note makers to carry their notes for five years did not affect the relations of the bank and the insurance company, whether known to the officers of the bank or not. *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 19 S. W. 241.

37. Acts in excess of corporate powers of bank.—*Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

A national bank is not bound by the unauthorized guaranty by its cashier of a bond and mortgage sold by it to one who had reason to know that it was acting only as a broker, where he made no inquiry as to the cashier's authority, and the bank received none of the proceeds of the sale. *Farmers', etc., Nat. Bank v. Smith*, 23 C. C. A. 80, 77 Fed. 129.

38. Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; *United States v. City Bank* (U. S.), 21 *How.* 356, 16 L. Ed. 130; *Merchants' Bank v. State Bank* (U. S.), 10 *Wall.* 604, 19 L. Ed. 1008; *Bank v. Dunn* (U. S.), 6 *Pet.* 51, 8 L. Ed. 316.

surrender the assets or securities of the bank.³⁹ And, strictly speaking, he may not, in the absence of authority, conferred by the directors, cancel its deeds of trust given as security for money loan—certainly not unless the debt secured is paid.⁴⁰ As a national bank has no authority to loan the money of other persons, it is not liable for a loan made by its cashier for a depositor, even though the loan was made as the result of a conspiracy with the president with intent to defraud the depositor.⁴¹ The taking of special deposits to keep merely for the accommodation of the depositor is not within the authorized business of national banks, and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking.⁴² The cashier of a bank has no implied authority to make a representation on behalf of the bank as to the solvency of one of its debtors, so as to estop the bank by reason of such a representation made by him in reply to an inquiry.⁴³ The cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft.⁴⁴ It has never been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which had not been authorized to make by those to whom has been confided the power to manage its business both ordinary and extraordinary.⁴⁵ While it may be the ordinary practice for the cashier of a bank to do the leasing of any of its extra rooms of the banking house, still as a matter of law it would seem to be well settled that the selling or leasing of the bank's property is outside of the ordinary business and duties of the cashier, unless he is especially authorized so to do.⁴⁶ Notwithstanding these recognized general propositions, heretofore stated and applied, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing or appearing upon the record of proceedings of the directors.⁴⁷ His authority may be proved and collected from circumstances.⁴⁸ It

39. Discharge of debtor or surrender of bank's assets, etc.—*Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

40. *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

41. Loans made by cashier for depositor.—*Grow v. Cockrill*, 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89.

42. Taking of special deposits for accommodation.—*Wiley v. First Nat. Bank*, 47 Vt. 546, 14 Am. L. Reg. 342, 19 Am. Rep. 122.

43. Representations as to solvency of debtor of bank.—*Crawford v. Boston Store Mercantile Co.*, 67 Mo. App. 39.

44. Binding bank to pay future draft on customer of bank.—*Flannagan v. California Nat. Bank*, 23 C. C. A. 836, 56 Fed. 959.

45. Purchase or sale of property or creation of agency for bank.—*Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716, quoting from *United States v. City Bank (U. S.)*, 21 How. 356, 16 L. Ed. 130. See also, *Winsor v. Lafayette County Bank*, 18 Mo. App. 665.

46. *Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716.

47. *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

48. *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank,⁴⁹ or it may be implied from the conduct or acquiescence of the corporation as represented by the board of directors.⁵⁰ A discount clerk has no authority by virtue of his office or his agency resulting from assignment to him of a bond and mortgage for use of the bank to secure a debt due to it to bind it by stipulation in a suit to which it is not a party, to the effect that he was holder and owner, where he had executed an unrecorded assignment to the bank.⁵¹

§ 262 (2ac) Liability of Bank for Mistakes, Fraud, or Misrepresentations of Agents.—In the case of agents or officers of national banks the usual rule applies that since a corporation can be negligent, fraudulent or mistaken, only through some agent, when a certain business or transaction is delegated to an agent, he becomes the corporation in conducting that business, and if he makes mistakes, is negligent, or commits fraud in so conducting it, the mistake, negligence or fraud are committed by the corporation. Where the agent is clothed with the power of the corporation to conduct a certain business, he is also clothed with the power on behalf of his principal to make mistakes or misrepresentations as might an individual in the ordinary course of such a business.⁵²

49. *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

50. *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

Where a cashier of a national bank bought and sold stocks for customers in the name of the bank, with the knowledge of the directors, the bank is liable for stocks embezzled by the cashier, though the bank was unauthorized to deal in stock. *Searle v. First Nat. Bank (Pa.)*, 2 Walk. 395.

51. Stipulation by discount clerk not binding on bank.—*Slade v. Bennett*, 133 App. Div. 696, 118 N. Y. S. 278.

52. Application of usual rule as to mistake, fraud or misrepresentation by agent.—*Arnold v. National Bank*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A., N. S., 580.

The cashier of a national bank, who has actual authority to employ a real estate broker to find a customer for lands belonging to the bank, binds the bank by a misstatement to the broker as to the identity of lands owned by it, as the ownership of the lands is a matter within the peculiar knowledge of the cashier and of which the broker is ignorant. *Arnold v. National Bank*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A., N. S., 580.

The cashier of a national bank, who

is its active executive officer and is intrusted with the duty of selling lands acquired by the bank in satisfaction of debts, and who has authority to employ a broker to sell such lands acts within the scope of his authority in designating to the broker the lands to be offered for sale, and a mistake in such designation is likewise within the scope of his authority, and is in effect the act of the bank, for which it is responsible. *Arnold v. National Bank*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A., N. S., 580.

A national bank is liable for fraudulent representations by its cashier to another bank as to the financial responsibility of a customer. *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338.

Hypothecation by cashier of stocks entrusted to him as such.—A national bank was held liable for the wrongful act of the cashier in transferring to his own name, and hypothecating for his own debt, stocks which plaintiff, according to the previous course of business of the bank, and with the consent of the president, had intrusted to the cashier, in his capacity as such, to sell, and place the proceeds to plaintiff's credit. *Williamson v. Mason (N. Y.)*, 12 Hun 97.

Fraud or representations outside of authorized business of bank.—A na-

§ 262 (2ad) Notice to Officer as Notice to Bank.—Where the officer of the bank acts as its agent in a transaction, facts material to the transaction which come to the knowledge of the officer constitute notice to the bank. Any knowledge of material facts which he acquires becomes at once the knowledge of the bank.⁵³ That which bank directors sought, by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.⁵⁴ While the general rule, that a knowledge of an agent is ordinarily to be imputed to the principal, applies to officers and agents of national banks, yet the well-established exception also applies in case of such conduct by the officer or agent as raises a conclusive

tional bank is not responsible for any false representations made by its teller to induce a person to purchase railroad bonds, the selling of such bonds not being within the authorized business of the bank. *Weckler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

The purchase and sale of its stock by the president of a national bank, for the purpose of getting the stock into the hands of desirable persons, will not render the bank liable for fraud in its sale, the purchases being accomplished by means of funds of the bank loaned to the president, and the proceeds of the sales applied in payment of such loans; no actual authority or agency being shown, and the stock being transferred to the president individually, and registered in his name; *Rev. St. U. S.*, § 5201, moreover, forbidding national banks to purchase or hold their own stock, except to secure a bona fide debt. *Prosser v. First Nat. Bank*, 106 N. Y. 677, 13 N. E. 287, 1 Silvernail Ct. App. 484.

53. Notice to officer as notice to bank.—*National Bank v. Thomas*, 30 R. I. 294, 74 Atl. 1092.

In an action by a national bank on a note given by defendant, where defendant's property was attached, statements made to plaintiff at the time of the loan regarding defendant's ownership of certain land were material to the transaction, and were notice to plaintiff, though under the provisions of the banking act a national bank may not loan money on real estate security given directly to the bank. *National Bank v. Thomas*, 30 R. I. 294, 74 Atl. 1092.

Where all the negotiations for a loan by a national bank to defendant

were conducted by the bank's vice president acting for the bank, the facts material to the transaction as to the ownership of property by defendant which came to the knowledge of the vice president were notice to the bank, and it was immaterial whether the vice president communicated his knowledge to other officers of the bank, or whether he remained an officer until the time an attachment issued in a suit on the note. *National Bank v. Thomas*, 30 R. I. 294, 74 Atl. 1092.

A bank cashier, who was indebted to the bank and also to a firm of which its president was a member, gave another creditor a mortgage on sheep, which provided that the mortgagor might sell part of the sheep, and that the proceeds should be applied on the debt secured. The cashier took part of the sheep to market, and sent a draft for the proceeds, in a letter, to the vice president of the bank, who acted as cashier in his absence, in which he simply said: "Place to my credit." The vice president applied part of the draft to the debt due the bank, and the balance on the debt due such firm. Held, that the knowledge of the cashier that the draft was the proceeds of the mortgaged sheep was not imputable to the bank, and it was not bound by his acts. *Rock Springs Nat. Bank v. Luman*, 5 Wyo. 159, 38 Pac. 678.

54. Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428. See, also, *Davenport v. Stone*, 104 Mich. 521, 63 N. W. 722, 53 Am. St. Rep. 467; *Wing v. Commercial, etc., Bank*, 103 Mich. 565, 61 N. W. 1009; *City Bank v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Cox v. Robinson*, 27 C. C. A. 120, 82 Fed. 277.

presumption that he would not communicate the fact in controversy;⁵⁵ as when the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the officer or agent was engaged in perpetrating.⁵⁶ While it is generally true that if a director of a bank who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, which is affected by his knowledge,⁵⁷ yet this principle can have no application when the director of a bank is the party himself contracting to act with it; in such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds by imputing to a bank a knowledge which those properly representing it could not have possessed.⁵⁸ The well-established proposition that a director of a corporation, acting avowedly for himself or on behalf of another with whom he is interested in any transaction, can not be treated as the agent of the corporation therein, applies to such transactions by the directors of a national bank.⁵⁹

§ 262 (2b) Ratification of Acts, or Estoppel to Deny Authority of Officer.—While the general rule is, as before stated, that the acts of an officer of a bank, to be binding upon the bank, must be done within the ordinary course of his duties, yet such officer may act without the scope of his authority and in a matter with reference to which he is not authorized, and yet the bank may subsequently act in such a manner with reference to the particular transaction or subject matter as to amount to a ratification of the unauthorized action of the officer,⁶⁰ or it may take such affirmative action in

55. Exception to rule as to imputation of knowledge.—*Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

56. Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

A shipped a cargo of sugar to B, and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B, and that the sugar was deliverable to his order, and made no mention of any agency. B indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors at a meeting at which B was present. Held, that B's knowledge of the fraud was not imputable to the bank, and that an action by A against the bank for the conversion of the sugar could not be maintained. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

57. Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

58. Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

59. Representation by cashier as to solvency or credit of corporation indebted to bank.—*Crawford v. Boston Store Mercantile Co.*, 67 Mo. App. 39.

60. Ratification of unauthorized act of officer.—*Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716.

Where the cashier of a national bank, who was also a director of an insurance company, received several notes, aggregating \$25,000, from subscribers to the stock of the insurance company, entered them on the books of the company as discounted paper, and passed them at their face value to the credit of the insurance company, the fact that the interest was not deducted in advance, nor the money delivered, but entered as a cash credit, does not support a contention that the notes were neither discounted nor negotiated. The act

accepting the benefits and fruits of the transaction as to preclude it from thereafter questioning or denying the authority of the officer to act for it.⁶¹ It may also remain silent and inactive at a time when good faith would have impelled it to have spoken up and disclaimed the unauthorized act of the officer.⁶² In these and many other instances that might be mentioned, the unauthorized action of the officer of a bank may become, in presumption and contemplation of law, the act of the bank itself.⁶³

of the cashier was, therefore, one that the bank could itself do or ratify, under Rev. St. U. S., § 5136, cl. 7, empowering national banks to discount and negotiate notes, etc. *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 19 S. W. 241.

61. Acceptance of fruits of transaction as estopping to deny authority.—*Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The retention by a national bank of the proceeds of the sale and guaranty of notes owned by the bank is a ratification of the president's act in such selling, whether he was authorized to execute the guaranty or not. *Thomas v. City Nat. Bank*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263.

Ratification of ultra vires act of cashier.—A national bank lent to one of its customers, a private corporation, an amount greater than ten per cent of its unimpaired capital stock and surplus, in violation of Rev. St., § 5200 (U. S. Comp. St. 1901, p. 3494), as amended by Act Cong. June 22, 1906, c. 3516, § 451 (U. S. Comp. St. Supp. 1909, p. 1331). The cashier of the bank who was secretary and treasurer of the borrower notified, another of such fact, and induced him to lend the bank's borrower an additional sum upon the guaranty of the cashier individually, and of the bank through the cashier, of the payment thereof. Held, that the bank could not ratify such ultra vires act of the cashier, and that the cashier's object in inducing the other person to make the loan was to secure to the bank payment of the amount lent by it, and to release the cashier from his liability in making the excessive loan, and that the bank received a considerable portion of the amount borrowed from it did not estop it from setting up the invalidity of its guaranty. *First Nat. Bank v. Monroe*, 135 Ga. 614, 69 S. E. 1123.

62. Silence or inaction as estopping to deny authority.—*Spongberg v. First*

Nat. Bank, 18 Idaho 524, 110 Pac. 716.

Where the cashier of a national bank has entered into a contract to lease certain of the bank property for a term of years, and it does not appear that he had any express authority from the board of directors to do so, but it does appear that the contract signed by the cashier and the lessee has been in possession of the bank for eighteen months, and that at least a majority of the directors of the bank had knowledge of the contract and its terms and conditions, and that the cashier was exercising the power and authority of leasing the bank property, and especially vacant rooms in the bank building, and that the bank's building committee or its board of directors made changes in the place and specifications of its building on the suggestion of the lessee, and incorporated the same in the building as erected and finished the room to be occupied by the lessee in accordance with his request and suggestions, and the board of directors never repudiated the contract or notified the lessee that they would not live up to the same until after the expiration of eighteen months and the completion of the building, such acts and conduct on the part of the board of directors amounted to a ratification of the action of the cashier and rendered the contract entered into by him the contract of the bank. *Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716.

63. Act presumed to be that of bank.—*Spongberg v. First Nat. Bank*, 18 Idaho 524, 110 Pac. 716. See, also, *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name, but power to do so may be conferred on him by the board of directors, either expressly, by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice. *National Bank v. Atkinson*, 55 Fed. 465.

§ 262 (3) Effect of Acts of Officers before Organization of Bank.

—Under Rev. St. U. S., § 5136, providing that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller to commence the business of banking, correspondence between one bank and the person who became the president of a bank afterwards formed can not constitute an agreement controlling the business between the banks, but may be referred to, in connection with other evidence, to show what was their understanding.⁶⁴ A national bank is not liable in its corporate capacity for the undertaking of an individual touching its organization, unless the bank, after its organization, adopt in some manner the contract.⁶⁵

§ 262 (4) Power After Bank Has Gone Into Liquidation.—The officers of a national bank which has gone into liquidation, having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes, shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders.⁶⁶

§ 263. Deposits in General—As to off-set against assessment on stock, see ante, "Conditions Precedent and Defenses," § 250 (3).

Power to Receive Deposits.—National banks are fully authorized to receive deposits under the provisions of § 5136 of the United States Revised Statutes.⁶⁷

Nature of General Deposit and Relation Thereby Created between Depositor and Bank.—The deposits of a national bank constitute loans to it and confer on the depositor a mere chose in action.⁶⁸ The doctrine of the law of banks that money deposited in a bank without special arrangement becomes the property of the bank, and properly available for use in its business, the depositor becomes a creditor of the bank to the amount of the deposit, was well settled when national banks were created and authorized to receive deposits, and the application of the general doctrine to the business of national banks was authoritatively recognized early in their history.⁶⁹ As a national bank is not a savings bank, it can not transact the

64. Effect of acts of officers before organization of bank.—First Nat. Bank v. Armstrong, 42 Fed. 193.

65. McDonough v. First Nat. Bank, 34 Tex. 309.

66. Power after bank has gone into liquidation.—Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

67. Power to receive deposits.—Sykes v. First Nat. Bank, 2 S. Dak. 242, 49 N. W. 1058; Leach v. Hale, 31 Iowa 69, 7 Am. Rep. 112.

68. General deposits considered as loans, conferring on depositor mere choses in action.—Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; Bank v. Millard (U. S.), 10 Wall. 152, 19 L. Ed. 897; State v. Clement Nat. Bank (Vt.), 78 Atl. 944.

69. Application of general doctrine as to deposit to national banks.—Bank v. Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437; Marine Bank v. Fulton Bank

same kind of business that a savings bank is incorporated to do, and if it has a savings department it does not receive deposits to be invested in specified securities under the supervision of the bank commissioners. It does not hold the deposits upon a trust creating the relation of trustee and cestui que trust, but upon a contract creating the relation of debtor and creditor.⁷⁰ A national bank receiving money from depositors for investment, under an agreement to pay a fixed rate of interest thereon, is a debtor to the depositors for the deposits and interest, for the interest agreed to be paid on the money received is not in the nature of a dividend or profits received from the successful management of the bank, but the depositors' security depends on the general insolvency of the bank.⁷¹ In order that a deposit of money with a bank may properly be entered on the books of the bank as a general deposit it must be the intention of the parties that the money thus deposited shall be mingled with the funds of the bank as an ordinary deposit, subject to withdrawal by check in the ordinary course of business,⁷² and entry on the books of a bank as a general deposit, of what is in reality a special deposit, not intended to be mingled with the funds of the bank, or to be used by it, is a violation of the statute against false entries in the books of a bank.⁷³ Thus, if the purpose of making a showing of money in a national bank, to deceive an examiner, money is left with the bank in a sack to be returned in the same condition without mingling with the bank's funds, this is not a deposit which may be entered as such on the books.⁷⁴

Giving of Bond to Secure Deposit.—Giving bond to secure funds deposited with it is within the power of a national bank, and sureties on such bonds are liable.⁷⁵

Validity of Contract as to Repayment of Deposit.—The power conferred upon national banks to receive deposits necessarily carries with it the power to contract as to the parties to whom the deposit shall be repaid.⁷⁶

(U. S.), 2 Wall. 252, 17 L. Ed. 785; *Thompson v. Riggs* (U. S.), 5 Wall. 663, 18 L. Ed. 704; *Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640; *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 24 S. Ct. 199; *Coffin v. Anderson* (Ind.), 4 Blatchf. 395; *Matter of Franklin Bank* (N. Y.), 1 Paige 249, 19 Am. Dec. 413; *Bank v. Jones*, 42 Pa. 536; *State v. Franklin County, etc.*, Trust Co., 74 Vt. 246, 52 Atl. 1069.

Generally, as to the relation created by a general deposit in a bank, see ante, "Relation between Bank and Depositor in General," § 119.

70. *State v. People's Nat. Bank*, 75 N. H. 27, 70 Atl. 542.

71. *State v. People's Nat. Bank*, 75 N. H. 27, 70 Atl. 542.

72. *United States v. Peters*, 87 Fed. 984.

73. **Entry of special deposit as general deposit on books of bank.**—*United States v. Peters*, 87 Fed. 984.

74. **Entry of special deposit on books of bank as a deposit.**—*United States v. Peters*, 87 Fed. 984.

75. **Giving bond to secure deposits.**—*State v. First Nat. Bank*, 88 Fed. 947.

76. **Contract with regard to repayment of deposit.**—*Sykes v. First Nat. Bank*, 2 S. Dak. 242, 49 N. W. 1058.

Where money is deposited in a national bank under a contract obligating the bank to pay it to a third person on the performance of certain work by the latter, the bank can not, after the performance of the work, object to the payment of the money to the person entitled thereto on the ground that the national banking act did not empower it to enter into such a contract. *Sykes v. First Nat. Bank*, 2 S. Dak. 242, 49 N. W. 1058.

Right of Debtor to Set Off Deposit against Debt Due Bank.—See post, "Right of Debtor to Set Off Claim against Bank," § 286 (3).

§ 264. Payment, Acceptance or Certification of Checks.—**Payment of Checks.**—Generally as to payment of checks by banks, see ante, "Payment of Checks," § 137. In an action against a national bank for the alleged payment of a raised check the usual rule applies that it is a question of fact to be determined by the jury, from all the circumstances, whether or not the plaintiff was guilty of contributory negligence in issuing the check so as to be capable of being raised without giving the instrument a suspicious appearance.⁷⁷ So, also, there may be such suspicious circumstances connected with the transaction as to make it a question of fact for the jury as to whether or not the plaintiff did not in fact authorize the check for the full amount paid.⁷⁸

Acceptance of Checks or Certification without Funds.—The Act of Congress passed March 3, 1869, making it unlawful for a national bank to certify checks, unless the drawer has, at the time, an amount of funds on deposit in said bank equal to the amount specified in the check, does not invalidate an oral acceptance of a check or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it.⁷⁹ Nor does such act of congress invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but engaging to pay such check whenever a draft left with it for collection by the drawer and sufficient in amount for the purpose, shall have been paid.⁸⁰ Certification of a noncommercial instrument by the president of a bank for the benefit of the drawers, for the purpose of indemnifying the drawers' surety on a building contractor's bond, did not constitute a representation that the drawers had on deposit in the bank the amount specified in such instrument as the limit of the indemnity.⁸¹

§ 265. Certificates of Deposit.^{81a}—Certificates of deposit in the ordinary form issued by a national bank to depositors, and payable to order, are not post notes, within the prohibition of § 5183 of the United States Revised Statutes,⁸² which forbids national banks to issue any other notes to circulate as money than such as are authorized by the provisions of the statute.⁸³ A certificate of deposit, issued by a national bank, payable to the

77. Action for payment of raised check—Questions for jury.—*Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y. S. 497.

78. *Timbel v. Garfield Nat. Bank*, 121 App. Div. 870, 106 N. Y. S. 497.

79. Acceptance of checks or certification without funds.—*Merchants' Nat. Bank v. First Nat. Bank*, 7 W. Va. 544.

80. *Merchants' Nat. Bank v. First Nat. Bank*, 7 W. Va. 544.

81. Effect of certification of a non-commercial instrument.—Fidelity, etc.,

Co. v. National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782.

81a. Generally, as to issuance by banks of certificates of deposit, see ante, "Certificates of Deposit," § 152.

82. Power to issue certificates of deposit.—*Riddle v. First Nat. Bank*, 27 Fed. 503.

83. *Hunt v. Appellant*, 141 Mass. 515, 6 N. E. 554; *Logan Nat. Bank v. Williamson*, 1 O. C. D. 395, 2 O. C. C. 118.

"If congress had intended to prohibit the issue of certificates of de-

order of the depositor on the return of the certificate, is not due or suable until demand made and return of the certificate.⁸⁴ Such certificates are not designed or adapted to circulate as money.⁸⁵ An indorsement of a certificate of deposit, issued by a national bank, by the person to whom it was issued, to a trustee, who purchased it with trust funds in his hands for the benefit of the cestui que trust, and indorsed it to himself as trustee, does not of itself show that the latter indorsement represents a transaction by which the trustee individually transferred the certificate to himself as trustee.⁸⁶ The statute of limitations is not set in motion against a certificate of deposit issued by a national bank by the appointment of a receiver for the bank which issued it.⁸⁷

§ 266. Special Deposits.—Power to Receive.—While, according to some decisions, it has been held that national banks created under the act of congress have no power to bind themselves by receiving special deposits, and no action can be maintained against the bank for any such deposit left with the cashier and not returned,⁸⁸ yet, according to other and more recent

posits altogether, or all certificates payable on time or with interest, it would probably have said so in plain terms." *Hunt v. Appellant*, 141 Mass. 515, 6 N. E. 554.

"It will be observed that this section [5183] does not prohibit the issuing of post notes except to circulate as money. The certificate in suit is for a deposit of money; it represents the indebtedness of the bank to the depositor for an actual loan; it is not to circulate as money, nor is it so intended. The bank has received the money from the depositor, and this time certificate represents that loan. It is not the bank's paper upon the market, issued by the bank with the intention to circulate from hand to hand for the purpose of the transaction of business." *Logan Nat. Bank v. Williamson*, 1 O. C. D. 395, 2 O. C. C. 118.

In *Shute v. Pacific Nat. Bank*, 136 Mass. 487, it was held that a certificate of deposit was not to be deemed a promissory note, within the meaning of a statute providing that, in any action by an indorsee against the promissor upon a promissory note, payable on demand, any matter should be deemed a legal defense which would be a defense to a suit thereupon if brought by the promisee; so that the bank was held not to be entitled to defend an action, brought by the indorsee to recover the amount of the certificate, by setting off a debt due to the bank from the original depositor. It was recog-

nized in that case that such certificates have in most respects the incidents, of promissory notes, and are classed as such; but certain distinctions were pointed out between them and common promissory notes such as were contemplated by the statute.

84. Necessity for demand and return of certificate.—*Riddle v. First Nat. Bank*, 27 Fed. 503.

85. *Riddle v. First Nat. Bank*, 27 Fed. 503.

86. Effect of indorsement of certificate.—*Hunt v. Appellant*, 141 Mass. 515, 6 N. E. 554.

87. Appointment of receiver as setting in motion statute of limitations against certificate.—*Riddle v. First Nat. Bank*, 27 Fed. 503.

88. View that national banks are not empowered to receive special deposits.—*First Nat. Bank v. Citizens' Bank*, Fed. Cas. No. 4,802; *Wiley v. First Nat. Bank*, 47 Vt. 546, 14 Am. L. Reg. 342, 19 Am. Rep. 122; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Walker v. First Nat. Bank*, 42 Md. 581; *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35.

Power to receive special deposits is not conferred by a charter "to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing credit therefor." *First Nat. Bank v. Citizens' Bank*, Fed. Cas. No. 4,802.

National banks can not bind themselves or the corporators by accepting specific valuables on special de-

decisions, it has been held that such power is impliedly given to national banks by the language of § 5228, U. S. Rev. Stat., authorizing a national bank, after its failure, to "deliver special deposits."⁸⁹ Such implication is as effectual as an express declaration of the same thing would have been.⁹⁰

posit for safe-keeping and return on demand. *Wiley v. First Nat. Bank*, 47 Vt. 546, 14 Am. L. Reg. 342, 19 Am. Rep. 122.

The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks. *Wiley v. First Nat. Bank*, 47 Vt. 546, 14 Am. L. Reg. 342, 19 Am. Rep. 122.

A national bank has not implied power, as incidental to the purpose of its organization, to receive government bonds as a special deposit, though the forty-sixth section of the banking act allows such banks, while winding up their affairs, to deliver special deposits. *Whitney v. First Nat. Bank*, 50 Vt. 388, 28 Am. Rep. 503.

The receiving securities or other property as custodian or bailee, either gratuitously or for hire, is not within the ordinary business of a banking corporation, organized under the United States National Currency Act of 1864 (13 Stat. 99), and it is not within the scope of the general powers or apparent authority of the executive and ministerial officers of such a corporation to bind the corporation by a contract for such a bailment. And in the absence of proof that special authority has been delegated by its board of directors, or has been exercised with their sanction or knowledge, or of evidence that it has been the habit and practice of the corporation to receive property for safe-keeping, it is not responsible for property so received by its cashier. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

These decisions rest upon the assumption that the act under which national banks are organized expressly sets forth the powers conferred upon those banks, and does not include among them power to receive special deposits, and that such a power is not given them by the grant of all such incidental powers as shall be necessary to carry on the business of banking. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

Power to take deposits as collateral security for existing debt and future obligation.—In *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35, a

national bank received from a customer bonds as collateral security for a debt then existing, and for future obligation. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank. It was held that although a national bank is not authorized to enter into a contract as a mere gratuitous bailee by receiving special deposits for safe-keeping merely, the bank in this case was not a gratuitous bailee of such bond; that it had power to take the bonds as security for existing or future loans; that it was liable after it failed to exercise ordinary care and diligence in keeping the bonds; and that the measure of damage was the value of the bonds when stolen, and not when demand of them was made.

In an action against a national bank, by the senior member of a firm, to recover the value of his bonds that had been deposited with the bank as collateral security for "call loans" to the firm, but, at a time when the firm was not indebted to the bank, had been stolen by burglars, held, that the contract entered into by the bank was not a mere gratuitous bailment. *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35.

A circular, issued by a national banking corporation, inviting the correspondence of other banks, and offering to buy and sell securities for them, is no evidence of a consent, on its part, to become a general bailee and depository of such securities for its correspondents. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

89. Power of national bank to receive special deposits implied in United States Rev. Stats., § 5228.—*National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582.

90. National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750.

The provision of Rev. St. U. S., § 5228, that a national bank, after its failure, may deliver special deposits, is a legislative recognition of the power of national banks to receive special deposits. *First Nat. Bank v. Strang*, 138 Ill. 347, 27 N. E. 903.

What May Be Received as Special Deposits.—The phrase, "special deposits," as used in § 5228, Rev. Stats., embraces public securities of the United States.⁹¹

Liability for Loss of Deposit—In General.—A national bank may receive a special deposit of securities, either on a contract of hiring or without reward, and it will be liable for a greater or less degree of negligence accordingly.⁹² The degree of care required of the bank depends upon the nature of the bailment.⁹³ In the case of special deposits without special contract or reward, the usual rule in the case of gratuitous bailments applies, and the bank is liable only for losses arising from want of ordinary care,⁹⁴

91. What may be received "as special deposits"—Securities of United States.—*National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

92. Liability for negligent loss of deposit.—*National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Wylie v. Northampton Nat. Bank*, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268; *Whitney v. First Nat. Bank*, 154 U. S. 644, 26 L. Ed. 212, 14 S. Ct. 1215.

When a national bank has habitually received special deposits, its liability for loss by gross negligence attaches to a deposit received in the usual way. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582, limiting *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181, disapproving *Wiley v. First Nat. Bank*, 47 Vt. 546, 14 Am. L. Reg. 342, 19 Am. Rep. 122; *Whitney v. First Nat. Bank*, 50 Vt. 388, 28 Am. Rep. 503.

Under such circumstances it is liable to the same extent as though such deposits were authorized by charter. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013; *First Nat. Bank v. Graham*, 79 Pa. 106, 21 Am. Rep. 49.

"In *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750, one Graham had deposited in a national bank certain bonds of the United States for safe-keeping, and had received from the cashier a receipt setting forth that fact, and that the bonds were to be redelivered on the return of the receipt. Before and after that time, the officers of the bank were accustomed to receive such deposits from others, and they were entered in a book kept by the bank. The bonds were stolen from the custody of the bank, through its gross negligence. On this state of facts, this court said (p. 702): 'If a bank be accustomed to take such deposits as the one here in question, and

this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter.'" *Manhattan Bank v. Walker*, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

93. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

94. Application of general rule as to gratuitous bailments.—*Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59.

Where a national bank has been accustomed to receive bonds on special deposit gratuitously, it is liable for a loss occurring through want of ordinary care. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

Where a national bank, without compensation, receives bonds as a special deposit for safe-keeping, it is liable for loss thereof, where it occurred through want of ordinary care. *Lancaster County Nat. Bank v. Smith*, 62 Pa. 47.

The degree of care required of such depositary has been held to be that which he bestows on his own goods. *Scott v. National Bank*, 72 Pa. 471, 13 Am. Rep. 711.

According to some decisions it is held that the bank, as gratuitous bailee, is not responsible for that care which every attentive and diligent man takes of his own goods, but only for that care which the more inattentive take. *First Nat. Bank v. Rex*, 89 Pa. 308, 33 Am. Rep. 767.

It is usually stated that a bailee who is to receive no reward is liable only for gross negligence, and some of the cases hold that such a bailee is responsible only for the want of that care which is taken by the more inattentive. But that rule can not be applied to all cases of bailment without reward; for when securities are deposited with persons accustomed to receive such deposits, they are liable

or, as it is usually termed, gross negligence,⁹⁵ and the burden of proving this gross negligence is on the plaintiff.⁹⁶ A bank acting as a mere depositary without special contract or reward and exercising such care as it bestows on its own goods, has been held not to be liable for a larceny of the deposit, even by its own officers.⁹⁷ It has been held, however, that a national bank is liable to a special depositor for the loss of his deposit through its diversion by the bank officers.⁹⁸

for any loss occurring through the want of that care which good business men would exercise in regard to property of such value. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

95. Liability as gratuitous bailee for gross negligence.—*National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Whitney v. First Nat. Bank*, 154 U. S. 644, 26 L. Ed. 212, 14 S. Ct. 1215; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *First Nat. Bank v. Rex*, 89 Pa. 308, 33 Am. Rep. 767; *Scott v. National Bank*, 72 Pa. 471, 13 Am. Rep. 711.

Liability incurred in recovery of stolen deposits.—It would certainly be competent for a national bank to take measures for the recovery of its own property stolen by burglars, and if the loss included the property of others, and it was deemed best, having reference to the bank's own interest, that these measures should be taken by the bank alone for itself and all concerned, it might lawfully undertake to act for others thus jointly concerned with itself as well as for itself alone; and want of proper diligence, skill, and care in the performance of such an undertaking would be ground of liability, to respond in damages for such failure. Much more would the bank be liable, in such a case, if, in the performance of such an undertaking, it used the property of the plaintiff for the recovery of its own. *Wylie v. Northampton Nat. Bank*, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268.

The evidence here failed to establish either that the bank did make such an agreement to act as the plaintiff's agent in the recovery of her property; or that it was guilty of a want of due care and diligence in the performance of its duty as such, whereby the loss occurred. On both of these points there was no evidence to charge the defendant sufficient to require it to be submitted to the jury. *Wylie v. Northampton Nat. Bank*, 119 U. S. 361, 30 L. Ed. 455, 7 S. Ct. 268. See, generally, the preceding divisions of this section.

96. Burden of proving gross negligence.—*First Nat. Bank v. Rex*, 89 Pa. 308, 33 Am. Rep. 767.

Prima facie evidence of loss by negligence.—A demand on a bank for bonds held on special deposit, and refusal to deliver the same, with no other explanation than the statement that the bank has no such bonds in its possession, is prima facie evidence of loss by negligence. *First Nat. Bank v. Zent*, 39 O. St. 105, 4 Ky. L. Rep. 1013.

97. Liability for larceny of deposit by bank officers.—*Scott v. National Bank*, 72 Pa. 471, 13 Am. Rep. 711.

The loss of a special deposit through the theft of cashier or clerks of a national bank does not render the bank liable in the absence of negligence in the selection of such cashier or clerks, or in permitting them to be retained after notice of unfitness. *Smith v. First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59.

Bonds deposited in a national bank for safe-keeping were stolen by the bank's teller. After he had absconded, it was discovered that for two years he had been embezzling funds of the bank. The owner of the bonds claimed that the bank had been negligent in not examining the teller's books, and discovering his frauds. Held, that such negligence did not enter into the cause of the loss, and could, therefore, be no ground of recovery. *Scott v. National Bank*, 72 Pa. 471, 13 Am. Rep. 711.

98. Liability for diversion of deposit by officers of bank.—*El Paso Nat. Bank v. Fuchs* (Tex. Civ. App.), 34 S. W. 203.

Personal liability of officer to depositors.—An officer of a national bank who uses a special deposit in such a manner as to destroy its character, as such, is personally liable to the depositor, on the loss of such deposit, caused by such misuse. *El Paso Nat. Bank v. Fuchs* (Tex. Civ. App.), 34 S. W. 203.

Allowance of set-off in action against bank for conversion of special deposit.—In an action against a bank and its

Liability for Securities Received with Undertaking to Return Those of Different Class.—It is within the scope of the general business of a bank organized under the federal banking law to receive on deposit certain securities with an undertaking to return those of a different class.⁹⁹ As to the liability of a bank, such a transaction is governed by the same rules which would apply in the case of the deposit of money to be repaid in different currencies, or the receipt by the institution of commercial paper for collection.¹ The bank will not be regarded as a mere mandatory or bailee acting without compensation, but, on the contrary, will be held to the terms of the contract, and liable to the depositor for the value of the securities on its refusal to deliver them.²

§ 267. Deposits of Public Money.—Banks Made Depositaries of the Federal Government.—Banks made depositaries and financial agents of the federal government must give bond to an amount in the discretion of the secretary of the treasury for the safe-keeping and prompt payment of the public moneys deposited, and the faithful performance of their duties as financial agents.³ But the fact that a bank is an authorized United

officers and receivers for the conversion of a special deposit, a set-off will be allowed for the payment of part of the deposit by an agent bank in a foreign country, also in the hands of a receiver, to which the deposit had been transferred. *El Paso Nat. Bank v. Fuchs* (Tex. Civ. App.), 34 S. W. 203.

99. Accepting deposit of certain securities with undertaking to return securities of different class.—*Leach v. Hale*, 31 Iowa 69, 7 Am. Rep. 112.

1. *Leach v. Hale*, 31 Iowa 69, 7 Am. Rep. 112.

2. *Leach v. Hale*, 31 Iowa 69, 7 Am. Rep. 112.

Where a bank organized under the federal banking law receives on deposit United States bonds of one class, under promise or agreement to exchange them for those of another, it will not be regarded as a mere mandatory or bailee acting without compensation, but, on the contrary, held to the terms of the contract, and liable to the depositor for the value of the bonds on its refusal to deliver them. *Leach v. Hale*, 31 Iowa 69, 7 Am. Rep. 112.

3. Bond required of banks made depositaries of federal government.—*United States v. National Bank*, 73 Fed. 379.

"When the banks are made depositaries of public moneys and employed as financial agents of the government, it is the duty of the secretary of the treasury to require them to give satisfactory security by the deposit of United States bonds, or otherwise, for

the safe-keeping and prompt payment of the public money deposited, and for the faithful performance of their duties as financial agents. The amount of security which the secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. Rev. Stat., § 5497. The government can thus always have security, limited in amount only by the judgment of the secretary, for public moneys deposited with any national bank." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

Construction of bond for indemnity of the United States.—In the construction of a bond executed by the president and directors of the Bank of Somerset to the United States, for the performance of an agreement made by them with the United States, for the payment of a debt due to the United States, arising from deposits made in the bank, for account of the United States, it was held that the obligors undertook for the faithful performance, by the president and directors, of the contract recited in the condition of the bond, on which the suit is instituted; and not for their own conduct as individuals; and that they were responsible for any failure on the part of the bank to perform

States depository does not make it a part of the United States treasury, or make the United States responsible for funds placed in it and lost, as for funds paid into the treasury,⁴ and it is only public moneys of the United States of which national banks can be made the depositories.⁵

that engagement. *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

"The statement of the condition of the bank of the 11th of May, 1820, which appears in the record, is evidence to be submitted to the jury, who are the judges, on the whole testimony, how far the estate of the bank was, at that time, sufficient to pay the debt due to the United States; and if any part of that estate has been wasted or misapplied by the corporate body, or their agents, or has been appropriated unnecessarily to any purpose other than towards the debt of the United States, or is otherwise unaccounted for; the defendant is responsible for such misapplication or waste, and for any sum not accounted for." *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

"The obligors did not undertake by their bond, to call in the debts due to the bank. That duty was to be performed by the president and directors of the bank; for whose faithful performance of it, the obligors are responsible." *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

"The attachments at the suit of the United States which had been laid in the hands of the debtors to the Bank of Somerset, prior to the date of the bond, fixed the debts in the hands of such debtors, as to the sum remaining due, after deducting the legal offsets against the bank, then in the hands of such debtors." *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

The bank is liable for the money received by the sheriff, who was one of the obligors, as their collector; and the defendant is liable therefor, as their surety; but the bank is not liable for the money which came to his hands, as sheriff, unless the president and directors were guilty of negligence in using the appropriate means to draw it out of his hands in reasonable time. *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

"It was the duty of the president and directors, to collect the debts due to the bank. In the performance of this duty, it might be necessary to purchase property pledged to the bank, which was subject to prior liens, and to relieve such property from its prior

encumbrances, in order to avoid a total loss of the debt. This may have been advantageous, or may have been disadvantageous, to the United States." *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

"The president and directors of the Bank of Somerset had no power over the judgment of the United States. They could, therefore, proceed only in the state courts; and were entitled to credit for such necessary expenses, as were incurred in such suits as it was prudent to bring." *United States v. Robertson* (U. S.), 5 Pet. 641, 8 L. Ed. 257.

4. Depositories not part of U. S. treasury.—Although a bank, in which a fund claimed by the U. S. as the proceeds of confiscated property was deposited by the officer having the custody thereof, was at the time when the deposit in it was made, a designated depository of public money, it was not part of the treasury of the United States, and the deposit was not equivalent to a payment of the money into the treasury, binding the United States to the claimants for its return in case the court should determine, in the condemnation suit, that it belonged to them. *Branch v. United States*, 100 U. S. 673, 25 L. Ed. 759, 15 Ct. Cl. 630.

5. Depositories of United States funds alone.—*Coudert v. United States*, 175 U. S. 178, 44 L. Ed. 122, 20 S. Ct. 56; *Branch v. United States*, 100 U. S. 673, 25 L. Ed. 759, 15 Ct. Cl. 630.

The designated depositories are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depository. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid

Funds Deposited by Postmaster under Permissive Authority.—National banks not designated as depositaries can not lawfully receive public moneys on deposit, except in the case of postmasters making deposits under peculiar circumstances.⁶ A national bank that knowingly receives funds from a postmaster under permissive authority, and opens an account with him in his official capacity, assumes a fiduciary relation to the government by reason of the privilege conferred, the confidence reposed, and the risk of possible loss.⁷ The bank, as a lawfully authorized bailee of such funds, is presumed to know the law regulating the care, custody, and disposition of the same, and can not, without incurring liability, knowingly allow the postmaster, by private check, to withdraw such funds for his personal use, and can not under any circumstances retain and apply such funds in satisfaction of the personal indebtedness of the postmaster on private account.⁸

Liability of Bank for Misappropriation by Public Officer of Public Funds.—A national bank with which a public officer has deposited public funds is not responsible for a misappropriation of such funds when checks against it are honored only when drawn by the depositor in the proper manner and apparently for proper public use, and perhaps when they are not

into the treasury. *Branch v. United States*, 100 U. S. 673, 25 L. Ed. 759, 15 Ct. Cl. 630.

By the seizure of a blockade runner during the Civil War the title to her did not change nor the title to the proceeds of her sale, *pendente lite*. That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an assistant treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depositary, and hence can not be recovered from the United States under the Tucker Act, the bank having failed. *Coudert v. United States*, 175 U. S. 178, 44 L. Ed. 122, 20 S. Ct. 56.

6. Receipt of public moneys by national banks not designated as depositaries—Exception to rule.—*United States v. National Bank*, 73 Fed. 379.

"By positive law and the specific regulations of the postoffice department (Postal Laws & Regulations, p. 72), all postmasters receiving public moneys in their official capacity are custodians of the funds collected by them or placed in their possession and custody, and are required to keep them safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, until ordered by the postmas-

ter general to be transferred or paid out. Where there is no designated depository in the county where a postoffice is situated, the postmaster may, at his own risk, and in his official capacity, make deposits in a national bank in his town or city, but he or any other person can not demand or receive, directly or indirectly, interest on such deposits." *United States v. National Bank*, 73 Fed. 379.

7. United States v. National Bank, 73 Fed. 379.

"This implied authority of law to receive public moneys on deposit is, in effect, equivalent to an express delegation of authority to receive, and constitutes such national bank a bailee of the government, and it assumes the obligation of safely keeping the public moneys thus deposited and accepted; and any undue negligence or nonobservance of law on its part has the legal effect of fraud and breach of the trust and confidence expected and reposed under the sanction of positive law. Such funds are to be held and safely kept for the purposes intended, and can only lawfully be withdrawn by a postmaster under orders of the postoffice department to meet the legitimate requirements of the public service." *United States v. National Bank*, 73 Fed. 379.

8. United States v. National Bank, 73 Fed. 379.

known by the bank to be for an improper use; but when knowingly, and for its own advantage, it permits and participates in a diversion of the funds to the discharge of the liabilities of an insolvent or embarrassed debtor to itself, it ought in good conscience to make restitution.⁹

Effect of Deposit of State Funds Where a Bank Gives Security and Agrees to Pay Interest on Daily Balances.—Where a state treasurer places state funds in a national bank subject to check, the bank giving security therefor, and agreeing to pay interest on daily balances, the transaction is a deposit, and not a loan to the bank.¹⁰

Liability of Insolvent National Bank for Public Moneys Deposited.—The fact that certificates of deposit issued by a national bank to a state treasurer in his official capacity for money of the state deposited were surrendered by his successor in office, who had the amount credited to his general account as treasurer, can not affect the liability of the bank to the state for the money actually deposited, and which was never repaid, nor does it justify the receiver of the bank in contesting the claim of the state or its treasurer therefor, where there is no defense to such claim on its merits.¹¹

§ 268. Collections.—See ante, "Collections," §§ 156-175 (5).

§ 269. Loans and Discounts—§ 269 (1) Power of Bank in General.—The power to discount promissory notes and other evidences of debt is, by statute, given to national banks.¹² The provisions of the National Banking Act authorizing national banks to discount negotiable paper intend

9. Liability of bank for misappropriation of funds deposited by public officer.—*McNulta v. West Chicago Park Comm'rs*, 40 C. C. A. 155, 99 Fed. 900.

A private banking firm transacted practically its entire business through a national bank. It cleared through such bank, and kept an account therein, in which it deposited all checks and cash items received, and against which checks drawn upon it and coming through the clearing house were charged. At a time when the firm was largely indebted to the bank, and known by the bank officers to be insolvent, one of the partners was appointed treasurer of a city park board, the president of the bank becoming surety on his bond. A portion of the park funds was at once used in paying a large overdraft of the firm in its bank account, the remainder being for a time carried in a separate account in the bank to the credit of the treasurer, but from which he from time to time checked amounts in payment of further overdrafts of the firm. Subsequently the entire account was transferred and merged in that of the

firm, the treasurer from that time nominally making the private firm his depository, and the firm depositing the park funds in its own bank account, as was known by the bank officers. Both the bank and the firm suspended through insolvency. Held, that the bank was a party to the misappropriation of the park funds by the treasurer, and was liable for the amount so misappropriated, and of which it received to some extent the benefit. *McNulta v. West Chicago Park Comm'rs*, 40 C. C. A. 155, 99 Fed. 900.

10. Deposit of state funds where bank giving security and paying interest on daily balances.—*State v. First Nat. Bank*, 88 Fed. 947.

11. Liability of insolvent national bank to state for funds deposited by treasurer.—*McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171.

12. Loans and discounts.—Act June 3, 1864; Rev. St., § 5136; *Morris v. Third Nat. Bank*, 73 C. C. A. 211, 142 Fed. 25; *First Nat. Bank v. Sherburne*, 14 Ill. App. 566; *Smith v. Exchange Bank*, 26 O. St. 141.

As to banks generally, see ante, "Loans and Discounts," §§ 176-187.

such discounts as are contemplated by the commercial law and the customs and usages of banks in general.¹³

Of National Bank of Another State.—A national bank has no authority to discount a note containing a provision for attorney's fees.¹⁴ A state statute prohibiting all corporations not authorized by the laws of this state from keeping an office of discount or deposit in the state, includes national banks organized and doing business in another state; and therefore, if such bank discounts a note at an office kept within this state without first complying with its laws, it can not maintain an action thereon.¹⁵

What Constitutes Discount.—A note taken in the usual course of business may be deemed to have been discounted, although the transaction may be termed a purchase.¹⁶

Purchase before Maturity.—Where a national bank purchases a negotiable note from the payee upon his indorsement before maturity, it is a purchase by discount, and not by barter and sale, and within the powers of the bank.¹⁷

Purchase of Evidence of Debt.—The power given to discount promissory notes and other evidences of debt is sufficiently comprehensive to include the purchase of notes at less than their face value,¹⁸ but the contrary has been held.¹⁹ A national bank can purchase municipal bonds issued by

13. Customs and usages of banking.

—First Nat. Bank v. Sherburne, 14 Ill. App. 566; Nicholson v. National Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223; Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909; Merchants' Nat. Bank v. Sevier, 27 Alb. Law J. (N. J.) 447.

The words "by discounting and negotiating promissory notes, drafts, bills of exchange," etc., contained in the eighth section of The National Currency Act of 1864, are not to be read as limiting the mode of exercising the "incidental powers" necessary to carrying on the business of banking, but as descriptive of the kind of "banking" which is authorized; and the true reading of the provision is that the company may carry on banking "by discounting and negotiating promissory notes, drafts, bills of exchange," etc., and may exercise "all such incidental powers as shall be necessary" for that purpose. Cleveland v. Shoeman, 40 O. St. 176; Shinkle v. First Nat. Bank, 22 O. St. 516.

Under act regulating currency.—The words, "by discounting and negotiating promissory notes, drafts, bills of exchange," etc., contained in Act Cong. June 3, 1864, relating to national currency (§ 8), do not limit the mode of exercising the "incidental powers" necessary to carry on the business of

banking, so that under that section a national bank may carry on banking "by discounting and negotiating promissory notes, drafts, bills of exchange," etc., and may exercise "all such incidental powers as shall be necessary" for that purpose. Shinkle v. First Nat. Bank, 22 O. St. 516.

14. Merchants' Nat. Bank v. Sevier, 27 Alb. Law J. (N. J.) 447.

15. National Bank v. Phoenix Warehousing Co. (N. Y.), 6 Hun 71.

16. First Nat. Bank v. Sherburne, 14 Ill. App. 566.

17. **Purchase before maturity.**—The transaction is, therefore, within the powers of such bank, and is not subject to the plea of the maker that the purchase was ultra vires, and the note still subject to the defenses which were available against the payee. Nicholson v. National Bank, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

18. **Purchase at less than face value.**—Morris v. Third Nat. Bank, 73 C. C. A. 211, 142 Fed. 25.

19. Three days before the maturity of a note for \$260, bearing no interest, a national bank obtained title to it by giving therefor \$259. The bank's rate of discount was 8 per cent, but the cashier testified that he did not calculate interest on the note, but gave

a board of education.²⁰

§ 269 (2) What Constitutes Discount.—A national bank is deemed to discount a note when it takes it in the usual course of business,²¹ although the transaction is termed a sale.²² Interest in advance need not be deducted.²³ The proceeds of the note need not be paid but may be deposited to the credit of the customer.²⁴

§ 269 (3) Power with Regard to Security Taken.—Under Act of 1864, a national bank may loan money on the security of corporate stock,²⁵

a lump sum therefor to the holder. Held, that the bank acquired the note by purchase, and not by discount, and, being a national bank, its act was ultra vires, and it acquired no title. *Ridgway v. National Bank*, 12 Ky. L. Rep. 216.

20. Purchase of municipal bonds.—Under The National Banking Act (Rev. St. U. S., § 5136 [U. S. Comp. St. 1901, p. 3455]), giving national banks all such incidental powers as shall be necessary to carry on the business of banking by "discounting and negotiating" promissory notes, drafts, bills of exchange, and other evidences of debt, a national bank has power to purchase bonds issued by the board of education of a city. *Newport Nat. Bank v. Board*, 114 Ky. 87, 24 Ky. L. Rep. 876, 70 S. W. 186.

21. What constitutes discount.—*First Nat. Bank v. Sherburne*, 14 Ill. App. 566.

Purchase of indorsed note.—Under Rev. St. U. S., § 5136, authorizing a national bank to exercise necessary powers to carry on the business of banking by discounting and negotiating promissory notes, etc., the purchase of a note from the payee, with the latter's indorsement, is a purchase by discounting in the usual course of business, such as is authorized by the statute, and is not a purchase by barter and sale, as would be the case if the note was taken without indorsement, or by indorsement without recourse. *Nicholson v. National Bank*, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

Deducting agent's commission.—Evidence that a note acquired by a national bank was in the hands of the indorser's agent, who consulted the indorser about the rate of interest before giving it to the bank, and that the money paid by the bank was paid to the indorser less the agent's commission, warrants, if it does not require, a finding that the bank discounted the note for the indorser,

within the meaning of Rev. St. U. S. 1864, c. 106, § 8, authorizing national banks to "discount and negotiate notes." *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. 909.

22. A note taken in the usual course of business may be deemed to have been "discounted," although the term "purchased" might be applied to the transaction. *First Nat. Bank v. Sherburne*, 14 Ill. App. 566.

23. *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 19 S. W. 241.

24. Proceeds deposited to credit.—Where the cashier of a national bank, who was also a director of an insurance company, received several notes, aggregating \$25,000, from subscribers to the stock of the insurance company, entered them on the books of the company as discounted paper, and passed them at their face value to the credit of the insurance company, the fact that the interest was not deducted in advance, nor the money delivered, but entered as a cash credit, does not support a contention that the notes were neither discounted nor negotiated. *Ellerbe v. National Exch. Bank*, 109 Mo. 445, 19 S. W. 241.

25. Corporate stock as security.—*Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. Ed. 855; *Canfield v. State Nat. Bank*, Fed. Cas. No. 2,382; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261.

A national bank has power under Act June 3, 1864, § 8 (13 Stat. 101), to loan money on the note or other personal obligation of the borrower secured by the hypothecation of corporate stock as collateral security. *Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101.

Conceding that a national bank can not acquire title in the stock of a corporation which is pledged to it, the pledgor can not recover the stock

note,²⁶ bond,²⁷ land certificate,²⁸ note or mortgage of third person,²⁹ and, it has been held, on tangible personal property.³⁰ While the Act of 1864 forbids national banks to make loans on the security of shares of their own capital stock, does not invalidate such a loan, since only the government can take advantage of the breach of the law.³¹

without satisfying the bank for its advances. *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84.

As incidental to the power of loaning money on personal security, a national bank, in the usual course of business, may accept stock of another corporation as collateral; and by the enforcement of its rights become owner thereof, and liable as a stockholder. *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84.

Stock of other national bank.—It is an ordinary mode of loaning, and there is nothing in the letter or spirit of The National Banking Act which prohibits it. *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

26. Promissory note.—A national bank has power to loan money on the personal note of the borrower, secured by the pledge of a warehouse receipt. *Cleveland v. Shoeman*, 40 O. St. 176. As to note of officer, see post, "Loan to Officers," § 269 (5).

27. Bond.—A national bank has power to enter into a contract whereby bonds are deposited with it as collateral security for call loans. *Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35.

In *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66, the bond was a railroad bond.

28. Land certificate.—"The proposition that as appellee is a national bank, created by and organized under the laws of the United States, it could not acquire a lien upon the land certificates in controversy, because such certificates are considered by the federal courts as real and not personal property, and that such banks are prohibited from taking real estate securities for loans, is not tenable. In the first place, land certificates issued under and by virtue of the laws of this state are by our supreme court held to be personal property, and this construction of our own laws by our own courts fixes the status of this property. In the second place, the question is one that can not be raised by an individual, as it has been held by the supreme court of the United States that this is a matter solely between the

bank and the government, and that if these banks should make loans upon lands, notwithstanding the prohibition in the federal statutes, that such contracts are good as between individuals, though the government may institute legal proceedings against the bank, on account of the violation of the law, to forfeit its charter or franchise." *Stone v. Brown*, 54 Tex. 330.

29. Note or mortgage of third person.—Under National Banking Law 1864, § 8, authorizing national banks to carry on "banking by discounting and negotiating promissory notes, bills," etc., and to exercise "all such incidental powers as shall be necessary for that purpose," such bank has authority to take notes and mortgages in the name of a third person for the purpose of securing its claims. *Shinkle v. First Nat. Bank*, 22 O. St. 516.

30. Tangible personal property.—The words "loans on personal security" (Act June 3, 1864, § 8) are used in contradistinction to "real estate security," and a national bank may take a pledge of chattels as security for money lent. *Pittsburg Locomotive, etc., Works v. State Nat. Bank*, Fed. Cas. No. 11,198.

But the contrary is held in *Montgomery Nat. Bank v. McCleaster* (Com. Pl.), 2 Pa. Dist. R. 546.

Attaching creditor can not object.—Where a bill of lading is issued to a national bank as security for money advanced on a draft for the price of the goods, a creditor of the shipper, who subsequently attached the goods, can not object that the bank had no authority to take goods as security for a loan. *Ayres, etc., Co. v. Dorsey Produce Co.*, 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376.

31. Loan on bank's own stock.—*Walden Nat. Bank v. Birch*, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211, affirming 55 Hun 606, 7 N. Y. S. 934, 28 N. Y. St. Rep. 98, following *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

The case of *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, undoubtedly overruled *First Nat. Bank v. Lanier* (U. S.), 11 Wall. 369, 20 L. Ed. 172; *Smith v. First Nat.*

To Secure Existing Debt.—A national bank can take an assignment of the money due and to become due from a city on a contract for paving a street, from the contractors, to secure an existing, bona fide indebtedness by the contractor to the bank.³²

Personal Property.—A national bank may take a chattel mortgage to secure a previously contracted debt, and may enforce the same.³³

Real Estate.—See elsewhere.³⁴

Incumbered Property.—A national bank may for the purpose of collecting a debt due to it from a creditor otherwise unable to pay the debt, take in payment property encumbered by other liens, such liens being still operative upon the property so taken.³⁵

§ 269 (4) Failure to Exact Security.—The omission of the officer of a national bank to exact security for moneys lent can not be made a ground of defense to an action brought by the bank to recover such loan.³⁶

§ 269 (5) Loan to Officers.—The president or other officer of a national bank may borrow money of the bank, giving his note therefor.³⁷ A national bank may lend money, in good faith, without any fraudulent intent, to its directors as well as to others, provided the amount so loaned does not exceed the limitation of one-tenth of the capital stock actually paid in.³⁸ Therefore one national bank which loans money to another, knowing that the latter intends to loan the same to its directors, may recover the same from the borrowing bank, if it had no knowledge of any fraudulent intent in making the loans to the directors, even though the directors failed to repay the same.³⁹

§ 269 (6) Loans Made in Excess of Prescribed Limit—§ 269 (6a) In General.—It is provided by Revised Statutes that the total lia-

Bank, 115 Ga. 608, 41 S. E. 983; Lee v. Citizens' Bank, 5 O. Dec. 21.

A national bank loaned money upon shares of its own stock as collateral security, and, upon default in payment, sold the stock, and applied the proceeds as a credit. Held, in an action by the debtor to recover the proceeds as having been unlawfully converted, that, if the illegality of loans on such security, under Rev. St. U. S., § 5201, can be urged at all, except by the government, it can only be done while the contract is still unexecuted after the stock is sold, and the proceeds applied to the debt, the courts will not interfere. First Nat. Bank v. Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778.

Rev. St. U. S., § 5201, provides that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the holder or purchaser of any such shares, etc. Held, that where a contract in

violation of this provision had been executed, the parties, being in pari delicto, would not be relieved by the court. Chapin v. Merchants' Nat. Bank, 47 Hun 637, 14 N. Y. St. Rep. 272.

32. First Nat. Bank v. Ottawa, 43 Kan. 294, 23 Pac. 485.

33. Personal property.—Gaar, etc., Co. v. First Nat. Bank, 20 Ill. App. 661; Spafford v. First Nat. Bank, 37 Iowa 181, 18 Am. Rep. 6.

34. See ante, "Real Property," § 259 (1a).

35. Panhandle Nat. Bank v. Emery, 78 Tex. 498, 15 S. W. 23.

36. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248.

37. Blair v. First Nat. Bank, Fed. Cas. No. 1,485, 2 Flip. 111.

38. National Bank v. National Bank, Fed. Cas. No. 18,310.

39. National Bank v. National Bank, Fed. Cas. No. 18,310.

bilities of any borrower from a bank shall at no time exceed one-tenth of the capital stock of the bank actually paid in.⁴⁰ The object of this statute is to prevent national banks from making hazardous loans.⁴¹ The discount of a draft drawn by one company on another company, distinct firms, but composed of the same members, is a loan within this provision.⁴² The taking by a national bank, at the time of its organization from a state bank, a discounted note therefrom is not within the provision.⁴³ A loan, if the excess is by mistake or ignorance or known to the bank only, is not within the provision.⁴⁴

Renewal Note within Limit.—To a suit brought by a national bank on a renewal note it is no defense that the original loan was for a larger sum than the bank was, by its charter, authorized to make, the debt upon the renewal being reduced within the limited maximum.⁴⁵

§ 269 (6b) Who May Raise Question.—A violation of the statute prohibiting a national bank from loaning more than ten per centum of its capital to any one person or corporation, can be taken advantage of only by the government in a proceeding to forfeit the bank's charter,⁴⁶ and not

40. Amount of loan.—Act of June 3, 1864, Rev. St., § 5200.

41. *Second Nat. Bank v. Burt*, 93 N. Y. 233.

42. A bank cashier discounted drafts drawn by P. & Co. on W. & Co., two distinct firms doing business in different cities, but composed of the same members, the former firm buying lumber, and shipping it to W. & Co. for sale; the latter also being consignee of third parties forwarding lumber on commission. Held, that such drafts were within the meaning of § 29 of the National Currency Act, which provides that bona fide bills drawn on actual existing values shall not be subject to the prohibition against banks loaning money to a single person or firm in excess of one-tenth of their capital. *Second Nat. Bank v. Burt*, 93 N. Y. 233, affirming, 26 Hun 672.

43. Made before change from state to national bank.—A national bank, at time of its organization from a state bank, took therefrom, among the discounted notes, one for a larger amount than the national bank was authorized to loan to a single borrower. Held, that such note was not, nor was any note subsequently given in renewal thereof, within the meaning of § 29 of the National Currency Act, given for money borrowed of the national bank. *Allen v. First Nat. Bank*, 23 O. St. 97.

44. Mistake or ignorance.—The fact that a bank, contrary to the provisions

of The National Bank Act of 1864, has lent in excess of one-tenth of its capital, will not avoid the loan if the excess was by mistake or ignorance, or known to the bank only. The fact of the excess is a matter aside from the loan, and not entering into its terms. *O'Hare v. Second Nat. Bank*, 77 Pa. 96.

45. *Allen v. First Nat. Bank*, 23 O. St. 97.

46. Objection by government only.—*Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101; *Stewart v. National Union Bank*, Fed. Cas. No. 13,435, 2 Abb. U. S. 424; *Gold Min. Co. v. National Bank*, 96 U. S. 640, 24 L. Ed. 648; *Wyman v. Citizens' Nat. Bank*, 29 Fed. 734; *Richeson v. National Bank*, 96 Ark. 594, 132 S. W. 913; *Mills County Nat. Bank v. Perry*, 72 Iowa 15, 33 N. W. 341; *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70; *Corcoran v. Batchelder*, 147 Mass. 541, 18 N. E. 420; *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364; *O'Hare v. Second Nat. Bank*, 77 Pa. 96.

The fact that a note in favor of a national bank was not executed by the real debtor, for the purpose of evading Rev. St. U. S., § 5200, which prohibits national banks from loaning to any one person or corporation an amount in excess of one-tenth of its capital stock, does not prevent the bank from enforcing the note against the maker, since the federal courts,

by the debtor⁴⁷ nor by another creditor of his.⁴⁸

§ 269 (7) Repayment of Loan.—A national bank is not bound to receive its own issue as a state bank, in its own proper business, the notes themselves not being a legal tender.⁴⁹ National bank directors may, in the exercise of their discretion, receive, before maturity, payment of debts owing to the bank, although such debts bear a high rate of interest, if the money is needed for the legitimate business of the bank.⁵⁰

Loan Made in Violation of Statute.—National banks are allowed to collect claims due them, even though a statute or a rule of law or equity may have been infringed in the incurring of the debt. The punishment for such infringement must come from the federal authorities, in a proceeding instituted for that purpose, and not by a denial by the courts of the right of collection, as a punishment.⁵¹

§ 270. Interest or Rate of Discount, and Usury—§ 270 (1) What Law Governs—Application of State Laws.—The act of congress relating to interest receivable and chargeable by national banks, supersedes the state laws on the subject of usury so far as they might otherwise be applicable to such banks.⁵² This act is a valid exercise of the power of con-

whose decision on the construction of federal statutes is binding on state courts, have decided that a violation of this section by the banks can not be taken advantage of by the debtors, but only by the government. *Portland Nat. Bank v. Scott*, 20 Ore. 421, 26 Pac. 276.

47. Debtor can not raise question.—*McCartney v. Kipp*, 171 Pa. 644, 33 Atl. 233; *Stone v. Brown*, 54 Tex. 330.

The defense can not be urged, to defeat securities given for a loan made by a national bank, that the loan was for an amount in excess of the restriction of the United States statute upon the amount of loans which may be made by such banks. *Mills County Nat. Bank v. Perry*, 72 Iowa 15, 33 N. W. 341.

W., having expressly authorized mortgaging of his interest in a dredge to secure money to build it and to carry out a dredging contract, also knew a national bank was financing the building, and the amount necessary exceeded \$60,000. Held that W. or his assignee could not object to a chattel mortgage executed to the bank for advancements in excess of one-tenth of its capital stock, in violation of Rev. St. U. S., § 5200 (U. S. Comp. St. 1901, p. 3494); there being no penalty imposed on a national bank for violation of such section, unless it be a forfeiture of its charter, as provided by § 5239. *The Seattle*, 95 C. C. A. 480, 170 Fed. 284.

Debtor not relieved from liability.—Where, in evidence of a loan actually made to a bank, the loaning bank accepts from the borrowing bank a note signed by the latter's cashier personally and indorsed by the borrowing bank, to avoid disclosing on the face of the transaction an excessive loan, the borrowing bank is not thereby relieved from its obligation as a debtor. *First Nat. Bank v. State Bank*, 15 N. Dak. 594, 109 N. W. 61.

Contra.—In an action by a national bank on a promissory note, evidence that there was an agreement to violate the provision of Rev. St. U. S., § 5200—that the liabilities shall not exceed one-tenth of the capital stock actually paid in—and that the loans were in excess of the power of the bank to make, held to be admissible. *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 Am. Rep. 438.

48. McCartney v. Kipp, 171 Pa. 644, 23 Atl. 233.

49. Thorp v. Wegefarrh, 56 Pa. 82, 93 Am. Dec. 789.

50. Keyser v. Hitz, 2 Mackey (13 D. C.) 513.

51. Merchants' Nat. Bank v. Wehrmann, 69 O. St. 160, 68 N. E. 1004.

52. What law governs.—Act of Cong. June 3, 1864; Rev. Stats., §§ 5197, 5198; 22 Pl. & Pr. 491; *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Driesbach v. National Bank*, 104 U. S. 52, 26 L. Ed. 658; *Florence R., etc., Co. v. Chase Nat. Bank*, 106

Ala. 364, 17 So. 720; *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995; *Sowers v. Citizens' Nat. Bank*, 12 Ky. L. Rep. 356; *First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *Central Nat. Bank v. Pratt*, 115 Mass. 539, 15 Am. Rep. 138; *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146. Judgment, *Bullmaster v. St. Joseph*, 70 Mo. App. 60, affirmed. *Central Nat. Bank v. Haseltine*, 155 Mo. 58, 55 S. W. 1015, 85 Am. St. Rep. 531, affirmed, *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 46 L. Ed. 118, 22 S. Ct. 50; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, affirmed in 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49; *Barker v. Rochester Nat. Bank*, 59 N. H. 310; *Importers', etc., Nat. Bank v. Littell*, 46 N. J. L. 506; *Johnson v. National Bank*, 74 N. Y. 329, 30 Am. Rep. 302; *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759; *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751; *Huntington v. Krejci*, 3 O. Dec. 532; *La Dow v. First Nat. Bank*, 51 O. St. 234, 37 N. E. 11, affirming 5 O. C. 147, 3 O. C. D. 75; *Vilas Nat. Bank v. Chambers*, 1 Wkly. L. Bull. 85, 7 O. Dec. 53; *Guthrie v. Reid*, 107 Pa. 251; *First Nat. Bank v. McCarthy*, 18 S. Dak. 218, 100 N. W. 14; *Hambricht v. Cleveland Nat. Bank*, 71 Tenn. (3 Lea) 40, 31 Am. Rep. 629; *Barrett v. National Bank*, 85 Tenn. 426, 3 S. W. 117; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371; *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

As to banks generally, see ante, "Interest or Rate of Discount, and Usury," § 181.

While national banks are not allowed to charge greater interest than may be charged under state laws by others, yet, if they do so, they are not amenable to penalties denounced by state laws, but to those denounced by congress. *Silva v. First Nat. Bank*, 10 Ky. L. Rep. 365.

As to waiver of homestead.—Rev. St. U. S., § 5198, provides that a bank knowingly charging usury shall forfeit the entire interest, and, in case usury be paid, shall be liable for twice its amount. The law of Georgia made a waiver of homestead void, if part of a usurious contract. A surety signed a note payable to a national bank, containing a waiver of homestead not knowing of the usury. Held, that the penalty imposed on national banks by the United States statute was exclusive, and hence, a waiver of home-

stead not being void because of usury, the surety's risk was not increased, and he was not discharged. *First Nat. Bank v. McEntire*, 112 Ga. 232, 37 S. E. 381.

Law making usury misdemeanor.—Code 1886, § 4140, making it a misdemeanor for any banker to discount commercial paper at a higher rate than 8 per cent per annum, does not apply to national banks. *Slaughter v. First Nat. Bank*, 109 Ala. 157, 19 So. 430.

Law imposing higher penalty.—Under Act Cong. June 3, 1864, prescribing the penalty for usury by national banks, a state law imposing a higher penalty is invalid. *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

A state law imposing a penalty on banks exacting usurious discounts does not apply to national banks, the penalty imposed on such banks by federal laws in regard to usurious discounts being exclusive. *Florence R., etc., Co. v. Chase Nat. Bank*, 106 Ala. 364, 17 So. 720.

Act of Ohio March 19, 1850, restraining banks from taking usury, has no application to national banks. *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751.

Law avoiding loan.—The statutes of a state avoiding contracts for usury can not be applied to contracts of national banking associations. Section 30 of the Act of June 3, 1864, imposes a specific penalty for usury in the contracts of national banks; and, in the absence of anything in the act indicating that this penalty should be regarded as additional to such penalties as might be imposed by the states, this provision must be regarded as exclusive. *First Nat. Bank v. Lamb* (N. Y.), 57 Barb. 429, reversed in 50 N. Y. 95, 10 Am. Rep. 438.

Whether fixed by state or not.—The clause of the National Banking Act, providing that the taking by a national bank of a greater rate than allowed shall be a forfeiture of all interest, applies as well to a case where the state has a fixed rate as to one where there is no rate fixed by the state, congress having full power to so legislate. *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751.

As to private contracts of bank.—An action can not be maintained against a national bank, located in this state, to recover back twice the amount of interest paid upon a usurious contract, where such contract related exclusively to the private af-

gress,⁵³ and is to be liberally construed.⁵⁴ A national bank is not subject to the laws of the state upon the subject of usury, except so far as congress may see proper to permit.⁵⁵ The rates of interest prescribed by states for their institutions or the public generally are binding on national banks located in such states only so far as they are made so by act of congress.⁵⁶

§ 270 (2) When Liability to Penalty for Taking Usury Incurred.

—**Bank Distinguished from Natural Persons.**—Under the provision of Revised Statutes that a national bank can not charge more than seven per centum per annum, prescribing a penalty for so doing, the bank is liable to the penalty although it is legal for natural persons to charge such rate of interest.⁵⁷

fairs of the bank, and where, in making it, the bank was in no sense acting as the agent of the general government. The act of congress (Acts 1864, c. 106, § 30), regulating the rate of interest and prescribing penalties for usury, has no application to the private contracts of national banks made in this state. *Hintermister v. First Nat. Bank*, 3 Hun 345.

Law forbidding corporation to plead usury.—Although a corporation under the New York law is not allowed to set up the defense of usury, a national bank which makes a loan to a corporation, at a rate exceeding 7 per cent, is liable for the forfeiture imposed under Act June 3, 1864, § 30, providing that when no rate of interest is fixed by the state law such bank shall not charge a rate exceeding 7 per cent. In re *Wild*, Fed. Cas. No. 17,645, 11 Blatchf. 243.

As to remedy.—In *Wiley v. Starbuck*, 44 Ind. 298, it was held The National Bank Act controlled as to the remedy.

State law making taking usury misdemeanor.—See post, "Criminal Prosecution under State Statute," § 270 (12).

As to remedy.—The remedy given by § 5198, Rev. Stat. U. S., for the recovery of usurious interest paid to a national bank, is exclusive. *Stephens v. Monongahela Bank*, 111 U. S. 197, 28 L. Ed. 399, 4 S. Ct. 366; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153, reaffirming *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113.

Cases holding contra.—No privilege of immunity from the usury laws of the states is conferred upon national banks by the Act of congress of 1864 (13 Stat. 99). *First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438.

A debt due a national bank may be purged of usury under the state stat-

ute if the debtor so elects, the remedy given by The National Banking Act for forfeiture of all interest or recovery of double the usury not being exclusive. *Farrow v. First Nat. Bank*, 20 Ky. L. Rep. 1413, 47 S. W. 594.

53. *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619.

54. **Construed liberally.**—Rev. St. U. S., § 5197, providing that national banks may charge the rate of interest allowed by the state or territory where they are located, but that where no rate is fixed the bank shall not charge exceeding 7 per cent, is to be liberally construed, and even when the language of the statute would restrict them to a less rate of interest than is allowed to individuals, the intentment of the law must be presumed to have been otherwise. *National Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771.

55. *Hambricht v. Cleveland Nat. Bank*, 71 Tenn. (3 Lea) 40, 31 Am. Rep. 629; *Barrett v. National Bank*, 85 Tenn. 426, 3 S. W. 117.

56. *First Nat. Bank v. Duncan*, Fed. Cas. No. 4,804.

57. **When liability incurred.**—Where a national bank in New York discounted for the payee, at the rate of 12 per cent per annum, certain promissory notes on which he could have maintained an action, held that, the legal rate being 7 per cent, he could recover twice the excess, under Rev. St., §§ 5197, 5198, providing that penalty where an association "takes, receives, reserves, or charges on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate greater than allowed by the laws of the state," etc., notwithstanding the fact that natural persons might make such charges or discount. *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

Necessity for Contract.—If the evidence of debt does not bear usurious interest on its face and there is no independent agreement for such rate of interest, a transaction is not usurious.⁵⁸

Loan Distinguished from Purchase.—The discount of notes of a third person indorsed to a bank is not a purchase of evidences of debt at their market value but a loan and within the prohibition of the national banking act against usury.⁵⁹ And so is the taking of accepted drafts from the holder without his indorsement.⁶⁰

Payment in Property.—The act comprehends payment of the usurious interest by transfer of property as well as payment in money.⁶¹ But it contemplates an actual payment of the usury, and, where property is accepted as payment, its market value at the time must exceed the principal and lawful interest, to amount to payment and receipt of illegal interest.⁶² And the parties must intend the property to be accepted as a payment.⁶³

Note Given in Payment for Article.—The act does not apply to the discounting by a bank for the payee of a note given in payment of an article, and stipulating for legal interest.⁶⁴

Renewal Note.—A note given in renewal of a note which was usurious

58. Necessity for contract.—Where, in an action by a national bank, on a bill of exchange against the acceptor, there was no evidence of any distinct agreement, when the bank discounted the bill, as to the interest or the exchange, or evidence of the current rate of exchange at that time, it was held insufficient to prove a usurious agreement by the bank under 13 Stat. 108, allowing such bank to discount bills of exchange at not more than the current rate of exchange in addition to the interest. *Wheeler v. National Bank*, 96 U. S. 268, 24 L. Ed. 833.

59. Discount.—Defendant, a national bank in New York, discounted for plaintiff certain notes of a third person, of which he was the holder, at a rate of 12 per cent per annum. Plaintiff thereupon indorsed the notes, which were paid at maturity, when he brought suit to recover the penalty prescribed by Rev. St., §§ 5197, 5198, prohibiting national bank from charging a rate of discount exceeding 7 per cent per annum, and providing that, for a violation of such provision, the bank should be liable for twice the amount of the interest reserved and paid in excess of 7 per cent. Held, that the transaction was not a purchase of the notes at a discount named, but was a loan or discount on the faith of the notes as security on which plaintiff was liable as indorser, and hence was within the prohibition of the statute, and rendered the bank liable to the penalty pre-

scribed. *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

60. The purchase of accepted drafts by a national bank from the holder without his indorsement at a greater reduction than lawful interest on their face value is a discounting of those drafts, within the meaning of Rev. St., § 5197, which prohibits such bank from taking interest on any loan or discount made by it at a greater rate than is allowed by the laws of the state where it is situated. *Danforth v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622.

61. Payment in property.—*First Nat. Bank v. Davis*, 135 Ga. 687, 70 S. E. 246.

62. *First Nat. Bank v. Davis*, 135 Ga. 687, 70 S. E. 246.

63. Intended as payment.—Rev. St. U. S., § 5198 (U. S. Comp. St. 1901, p. 3493), provides that the charging by a national bank of interest greater than allowed, when knowingly done, shall be deemed a forfeiture of the entire interest, and that, if the greater rate of interest has been paid, twice the amount thereof may be recovered. Held that, to constitute a payment by transfer of property within the statute, the parties must intend that the property be accepted as a payment. *First Nat. Bank v. Davis*, 135 Ga. 687, 70 S. E. 246.

64. *Second Nat. Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

and given for an amount more than was due is usurious.⁶⁵ An indorser on a renewal note can not set up usury on the original to which he was not an indorsee.⁶⁶ A charge of interest by a national bank, in excess of the legal rate, in making renewals of notes, is not equivalent to payment in cash, and does not render the bank liable to the penalty for receiving usurious interest.⁶⁷ The statute does not apply to notes which have been canceled by renewal, whereby what was before interest has become interest-bearing principal.⁶⁸ A national bank, which makes a loan on a note that embraces usury, and is renewed from time to time, forfeits the entire interest stipulated to be paid, and no portion of the usurious interest included in the renewal note can be recovered.⁶⁹ The renewal of a note by the surety and its subsequent payment by him with usurious interest, will not uphold a recovery by the principal from the bank under the federal statute.⁷⁰

Where Bank Acts as Attorney.—A national bank is not liable to the penalty for usury where it sold and signed the usurious note before maturity in good faith and was acting merely as the assignee's agent in collecting.⁷¹ Where a national bank charges compensation for the loan of its credit in endorsing a note upon which it procures a loan for the maker, such charge is not interest and can not be set up as usury in an action by the bank against the maker after payment of the note to the holder.⁷²

65. Renewal note.—*National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995.

Where a usurious note given to a national bank is renewed, and the interest included in the principal of the new note, only the amount of the original debt can be recovered, notwithstanding the new note, on its face, bears the legal rate of interest. *Farmers', etc., Bank v. Hoagland*, 7 Fed. 159.

Where a national bank discounts a note reserving a usurious rate of interest, and the borrower gives a new note in renewal at legal interest, the bank can recover only the amount of the renewal note, with interest, less the amount of the usury reserved on the original discount, credited as of that date. *National Bank v. Davis*, Fed. Cas. No. 10,038, 8 Biss. 100.

As to limitation of action to recover, see post, "Action for Penalty or to Recover Back Usury Paid," § 270 (11).

66. The National Banking Law, section 30, declares a forfeiture of all interest when usurious interest is taken, giving the party paying it the right to recover back twice the amount. One indorsed a note to a national bank as accommodation for the maker, the bank taking usurious interest. Subsequently the accommodation indorser gave a renewal note, with one as his indorser thereon. Held, that such last indorser could not set off the usu-

rious interest paid on the original note. *Bly v. Second Nat. Bank*, 79 Pa. 453.

67. Osborn v. First Nat. Bank, 175 Pa. 494, 34 Atl. 858.

68. Brown v. Marion Nat. Bank, 92 Ky. 607, 13 Ky. L. Rep. 812, 18 S. W. 635.

69. Series of renewals.—*First Nat. Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474.

70. Renewal and payment by surety.—*Lasater v. First Nat. Bank*, 40 Tex. Civ. App. 237, 88 S. W. 429.

71. Bank acting as attorney.—In an action against a national bank to recover, under Rev. St. U. S., §§ 5197, 5198, double the amount of interest paid on a usurious note, defendant is not liable if it proves that it sold and assigned the note before maturity in good faith, and was acting merely as the assignee's agent in collecting it. *First Nat. Bank v. Miltonberger*, 33 Neb. 847, 51 N. W. 232.

As to burden of proof of good faith, see post, "Action for Penalty or to Recover Back Usury Paid," § 270 (11).

72. Where bank merely procures discount.—A national bank procured a note to be discounted, receiving 5 per cent as compensation and for the loan of credit in indorsing such note. When the note became due the bank paid it, and brought suit against the makers,

Loan Secured by Mortgage on Real Estate.—A loan to a national bank at a usurious rate, although on the security of real estate,⁷³ subjects the bank to the penalty of the statute.⁷⁴

Where Excess Small.—The bank can not escape liability because the excessive interest was for a small amount.⁷⁵

Charged but Not Enforceable.—It is the interest charged, and not the interest as to which a forfeiture may be enforced, that the act makes illegal.⁷⁶

Contract to Pay Attorney's Fees.—An agreement for attorney's fees in case of a suit for collection is a case for usury and void as to a national bank discounting such note.⁷⁷

who set up the defense of usury. Held that, as the bank had not discounted the note, but merely procured its discount, the 5 per cent could not be deemed interest. *Gloversville Nat. Bank v. Wells* (N. Y.), 15 Hun 51.

73. Loan secured by mortgage on real estate.—See ante, "Real Property," § 259 (1a).

74. Bank liable for penalty.—A national bank took as security for a debt partly pre-existent and partly created at the time a real-estate mortgage naming an individual, an officer of the bank, as mortgagee. The transaction was usurious. Held that, having given the transaction the form of one with an individual, for the purpose of evading the liabilities peculiar to national banks, the bank could not be heard to assert its true nature for the purpose of evading the liabilities attaching to individuals, and of claiming the privileges of national banks. *Gadsden v. Thrush*, 56 Neb. 565, 76 N. W. 1060, 45 L. R. A. 654, affirmed on rehearing 58 Neb. 340, 78 N. W. 632, 45 L. Ed. 654.

A controversy respecting usurious interest paid on a note held by a national bank, secured by collateral note and mortgage, which arises in a suit to foreclose the mortgage, is none the less governed by the federal law on the subject of usury by national banks, as expressed in Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], affording the remedy of an independent action to recover back the usurious payments, because the collateral note and mortgage were executed in favor of the bank president for the benefit of the bank, which was prohibited by the federal law from taking real estate security for a debt coincidentally contracted. Judgment, *Gadsden v. Thrush*, 63 Neb. 881, 89 N. W. 403, reversed. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129.

In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing a national bank, the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the principal note to the bank, does not justify the extension of the exemptions of national banks, under the federal statutes, from penalties for usury, to such foreclosure proceedings. Order 56 Neb. 565, 76 N. W. 1060, 45 L. R. A. 654, affirmed on rehearing. *Gadsden v. Thrush*, 58 Neb. 340, 78 N. W. 632, 45 L. R. A. 654.

75. Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

76. Charged but not enforceable.—No recovery, under Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], of twice the amount of usurious interest alleged to have been paid to a national bank, can be had on the theory that because, in a decree of foreclosure, in which was deducted from the sum sued for the interest charged in excess of the legal rate, was included the remaining legal interest, which under that section was subject to forfeiture, illegal interest was paid by a sale under foreclosure on such judgment, since it is the interest charged, and not the interest as to which a forfeiture might be enforced, that the statute regards as illegal. Judgment 106 Iowa 361, 76 N. W. 726, affirmed. *Talbot v. First Nat. Bank*, 185 U. S. 172, 46 L. Ed. 857, 22 S. Ct. 612.

77. Contract to pay attorney's fees.—An agreement in a note to pay an attorney's fee of 10 per cent on the amount due, if suit is brought to enforce payment, for the use of the attorney bringing the suit, which is void as being a stipulation for a penalty or forfeiture, oppressive, a cover for usury, without consideration, and contrary to public policy, is also void, where the note has been discounted by a

Interest and Commission.—A national bank is liable for the penalty for usury where it loans its own money under an agreement by which it is to receive as interest and commissions an amount in excess of the legal rate of interest.⁷⁸

Payments of Debts of Third Persons.—The provision does not apply to voluntary payments of debts of third persons to the bank, which may be infected with usury.⁷⁹

Interest for Default in Payment.—The bank can not escape liability because the interest is usurious because of the failure of the borrower to pay a debt when due.⁸⁰

Knowledge of Bank.—The bank is subjected to the forfeiture only where it knowingly receives the excessive interest, where property is accepted in payment of a debt infected with usury, it must appear, not only that the market value of the property was in excess of the principal debt and legal interest, but that the transfer and delivery thereof was intended by the debtor and accepted by the bank as payment, not only of the lawful interest, but also of the illegal interest; the word "knowingly" meaning "with knowledge."⁸¹

Freeing Contract from Usury.—A loan previously made may be purged of usury, but it can only be done by making what is virtually a new contract, which of course requires the concurrence of both parties.⁸² It can

national bank, as being in excess of the powers of such bank under its charter. *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662.

78. Interest and commission.—A bank took a borrower's note payable in six months, which it discounted at 6 per cent per annum, the borrower orally agreeing to open an account with the bank, or in default thereof pay the bank $2\frac{1}{2}$ per cent on the loan as "commission." The money loaned belonged to the bank, and there was no agent or broker employed in the transaction. Held, that the agreement to pay $2\frac{1}{2}$ per cent was usurious, under Rev. St. 1881, c. 74, which provides that no person shall receive interest at a greater rate than 8 per cent per annum. *Union Nat. Bank v. Louisville, etc., R. Co.*, 145 Ill. 208, 34 N. E. 135.

79. *First Nat. Bank v. Davis*, 135 Ga. 687, 70 S. E. 246.

80. Interest for default in payment.—A national bank, which has made a 12 per cent charge on overdrafts, where 8 per cent is the highest rate of interest permitted by the state laws, can not escape the forfeiture prescribed by Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], where a greater rate of interest is charged than the state laws allow, because of the trifling

amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due. Judgment, 172 Mo. 384, 72 S. W. 925, affirmed. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

81. Knowledge of bank.—First Nat. Bank v. Davis, 135 Ga. 687, 70 S. E. 246; *Merchants', etc., Nat. Bank v. Horton*, 27 Okl. 689, 117 Pac. 201.

In an action to recover the penalty given by U. S. Rev. St., § 5197 (U. S. Comp. St. 1901, p. 3493) for usury on a note to a national bank, it is error to instruct that plaintiff is entitled to recover if the plaintiff has paid a greater rate of interest than the legal rate, and to refuse to instruct that the defendant must have received the usurious interest knowingly. *Merchants', etc., Nat. Bank v. Horton*, 27 Okl. 689, 117 Pac. 201.

82. Freeing contract from usury.—*Tyler on Usury*, 376; *Kilbourn v. Bradley*, 3 Day's Rep. 356; *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995; *Hammond v. Hopping* (N. Y.), 13 Wend. 505; *Bank v. Strong* (N. Y.), *Clarke Ch. 76*; *McClure v. Williams*, 7 Vt. 210.

Election to remit excess.—A national bank, whose action on a promissory note is met by the plea of usury, may not avoid the forfeiture of the entire

not be done by the mere indorsement thereon by the lender of the amount of interest reserved in excess of legal interest.⁸³ But a bank which has loaned money at usurious rate of interest may, upon receiving payment of the debt, discharge itself from all liability to the debtor by giving credit for the amount of interest reserved.⁸⁴ The rule that there is a *locus penitentiæ* for a creditor, and that at any time before entry of final judgment it may consider excessive interest paid as paid on account of the loan, and so apply it, and lessen the principal, does not apply where the statute declares that such taking of usurious interest forfeits the entire interest, as provided in the National Banking Act.⁸⁵

§ 270 (3) Application of Statute to Discounts.—The act of congress limiting the rate of interest to be charged by national banks, applies to discounts of commercial paper as well as to loans; and, therefore, where such bank discounts paper at a greater rate than seven per centum, in the absence of a state law allowing a greater rate, it is liable for the penalty provided for taking usurious interest.⁸⁶

§ 270 (4) Renewal of Usurious Note at Legal Rate.—See elsewhere.⁸⁷

§ 270 (5) What Rate of Interest May Be Charged.—The National Banking Act provides that a national bank may take interest at the rate allowed by the laws of the state or territory where the bank is located,⁸⁸ and

interest, imposed by Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], in absolute terms, by declaring an election to permit the excessive interest. Judgment 172 Mo. 384, 72 S. W. 925, affirmed. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

83. Where a national bank loans money at a usurious rate of interest, taking the note of the borrower therefor, and afterwards another note is given in renewal, bearing only the legal rate, and having indorsed thereon the payment of all interest in excess of that rate, the latter, notwithstanding the said indorsement, is affected with usury. *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995, distinguishing *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759.

84. *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995; *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759.

85. **Doctrine of locus penitentiæ.**—*Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, affirmed in 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

When partial payment is made to a national bank under a contract to pay usurious interest, in the absence of a

stipulation as to how the payment shall be appropriated, the law will apply it in liquidation of that portion of the contract which is legal, and the bank may afterwards avoid the penalty fixed by act of congress for collecting usurious interest by relinquishing claim for it. If, however, a partial payment on the debt is, by agreement between the bank and the debtor, appropriated to the payment of usurious interest, the *locus penitentiæ* can not exist, since the offense has been consummated and the right to recover the penalty is fixed. *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

86. **Application of statute to discounts.**—*National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742; *Johnson v. National Bank*, 74 N. Y. 329, 30 Am. Rep. 302. See post, "Usury as Defense or Set-Off or Counterclaim in Action by Bank," § 277; "Action for Penalty or to Recover Back Usury Paid," § 270 (11).

87. See post, "Interest on Renewal Note," § 270 (9cc).

88. **Rate of interest.**—*Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732; *Tiffany v. National Bank (U. S.)*, 18 Wall. 409, 21 L.

when no rate is fixed by the laws of the state or territory, the bank may take not exceeding seven per centum.⁸⁹

Where a state exempts loans to corporations from the provisions of its usury laws, and the highest court of the state declares that as to corporations no usury law exists, that provision of the National Banking Law making seven per centum the highest legal rate of interest in states where there are no usury laws, is applicable.⁹⁰

State Law Prescribing Different Rate for Banks and Natural Persons.—The National Banking Act provides that national banks may charge interest at the rate allowed by the laws of the state where the bank is lo-

Ed. 862; *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

Under the act of congress prescribing the rate of interest which national banks may charge; such banks may, in Texas, receive or charge interest not greater than 12 per cent per annum. *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and equality is carefully secured with local banks. *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732.

By general or special law.—National banks are authorized to take interest at such rates as are allowed by the state law to state banks of issue in the states where such banks are located; and it is immaterial whether the privilege given to state banks is given by general or special law. *First Nat. Bank v. Duncan*, Fed. Cas. No. 4,804.

Law as to compounding interest.—By compounding interest oftener than is permitted by Rev. St. Mo., § 3711, a national bank charges interest at a higher rate than that allowed by the laws of the state, within the meaning of Rev. St. U. S., § 5197 [U. S. Comp. St. 1901, p. 3493], fixing the rate which national banks may charge, although the compounded interest is less than the state laws permit to be charged directly without compounding. *Judgment*, 172 Mo. 384, 72 S. W. 925, affirmed. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

Where 10 per cent is the established legal rate of interest in a state, that amount may be recovered by a national bank as indorsee on a note stipulating such rate. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

89. In absence of state statute.—*Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Crocker v. First Nat. Bank*, Fed. Cas. No. 3,397, 4 Dill. 358.

90. No state law as to corporations.—A national bank, located in the city of New York, made a loan there to a corporation, which, if it had been made to an individual, would have been usurious, under the law of New York, as a loan at a rate exceeding the rate of 7 per centum per annum, so that the securities taken for the loan would have been void. A statute of New York forbids a corporation to interpose the defense of usury. The effect of such statute, as construed by the highest court of the state, is, that the rate of interest which a corporation may pay is not fixed or limited. The 30th section of the National Banking Act of June 3, 1864 (13 Stat. 108), provides, that, when no rate of interest is fixed by the laws of a state, a national bank may charge a rate not exceeding 7 per centum, and that if it charges more, the entire interest shall be forfeited. Held, that the interest on the loan in question was forfeited. *In re Wild*, Fed. Cas. No. 17,645, 11 Blatchf. 243, cited in brief in *First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187; *National Bank v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484.

Contra.—Act July 1, 1879, § 11, which provides that no corporation shall interpose the defense of usury in any action, does not prevent a corporation, when sued by a national bank for usurious interest, from setting up in defense that the transaction is illegal, under Rev. St. U. S., § 5197, which forbids national banks from charging interest in excess of the rate allowed by state laws. *Union Nat. Bank v. Louisville, etc., R. Co.*, 145 Ill. 208, 34 N. E. 135.

cated, and no more, except that where by the laws of the state a different rate is limited for banks of issue organized under such state, the rate so limited shall be allowed for national banks existing in such state.⁹¹ National banks may take the rate of interest allowed by the state to natural persons generally, and may take a higher rate, if the state banks of issue are authorized to take it,⁹² as the provision allowing national banks to charge the same rate of interest as state banks of issue is intended only to apply when such banks are by law allowed to charge a higher rate than natural persons.⁹³ Savings banks are not banks of issue within the meaning of the Banking Act.⁹⁴ A national bank is not liable to a penalty prescribed by a state law for charging more than the legal rate of interest, where, under an exception thereto, state banks of issue are allowed to receive such a rate as may be agreed on between the bank and its customer.⁹⁵

State Law Permitting Stipulated Rate.—A state law providing that it shall be lawful to contract for any rate of interest agreed on between the parties fixes the rate of interest within the meaning of the National Banking Act, providing that national banks may take the rate of interest allowed by the law of the state where the bank is situated, and if no rate is fixed, then it may take not more than seven per centum.⁹⁶

91. National on footing of state banks.—Rev. Stats., § 5197, 5 Fed. Stats., p. 130.

It has been held that the intention of U. S. St., § 5197, allowing national banks to charge the rate of interest allowed by the state or territory where they are located, but prohibiting the charging of more than seven per cent where no rate is fixed, was to put national banks on an equal footing with state banks. *National Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771.

92. Natural persons allowed higher rate than banks.—*Tiffany v. National Bank* (U. S.), 18 Wall. 409, 21 L. Ed. 862.

But it has been held in Ohio that under Act Cong. June 3, 1864, § 30, relating to national currency, a national bank can charge no greater rate of interest than is permitted by the banking laws of the state in which it does business, though a greater rate is allowed by the laws of that state to parties other than state banks. *Shunk v. First Nat. Bank*, 22 O. St. 508, 10 Am. Rep. 762.

93. Banks allowed higher rate than natural persons.—Under the laws of Missouri, 10 per cent interest may be charged by all persons except banks of issue, which are limited to 8 per cent. Held, that a national bank in Missouri could charge 10 per cent, as the provision allowing national banks

to charge the same rate as state banks of issue was intended only to apply when such banks were by law allowed to charge a higher rate than other persons. *Tiffany v. National Bank* (U. S.), 18 Wall. 409, 21 L. Ed. 862.

94. Savings banks.—Within Rev. St. U. S., § 5197, providing that national banks shall not receive a greater rate of interest than is allowed by the laws of the state in which they are domiciled, except where, by the laws of any state, "a different rate is limited for banks of issue organized under state laws," savings and deposit banks are not "banks of issue." *First Nat. Bank v. Gruber*, 87 Pa. 468, 30 Am. Rep. 378.

95. *First Nat. Bank v. Duncan*, Fed. Cas. No. 4,804, reversing Fed. Cas. No. 4,135; *First Nat. Bank v. Tinstman*, Fed. Cas. No. 4,805.

96. Law permitting any stipulated rate.—*Crocker v. First Nat. Bank*, Fed. Cas. No. 3,397, 4 Dill. 358; *Rockwell v. Farmers' Nat. Bank*, 4 Colo. App. 562, 36 Pac. 905; *La Dow v. First Nat. Bank*, 51 O. St. 234, 37 N. E. 11; *S. C.*, 3 O. C. D. 75, 5 O. C. 147; *Guild v. First Nat. Bank*, 4 S. Dak. 566, 57 N. W. 499; *National Bank v. Bruhn*, 64 Tex. 571, 53 Am. Rep. 771.

Stipulated in writing.—Rev. St. U. S., § 5197, authorizes national banks to take interest at the rate allowed in the state where the bank is located, and, when no rate is fixed by the laws

§ 270 (6) Remedies for Taking Usury.—See elsewhere.⁹⁷

§ 270 (7) Usury as Defense or Set-Off or Counterclaim in Action by Bank—§ 270 (7a) Where Actually Paid.—Where Paid.—It is no defense to an action on a note made to a national bank that the bank knowingly took a greater rate of interest than allowed by law; the remedy in such case is by suit to recover back twice the amount paid.⁹⁸ The bor-

of such state, they are authorized to take interest at a rate not exceeding 7 per cent. Held, that since 1 Hill's Code, § 2796, and Sess. Laws 1893, p. 29, allow individuals and state banks to take any rate of interest agreed to in writing by the parties to the contract, national banks have the same privilege. *Wolverton v. Exchange Nat. Bank*, 11 Wash. 94, 39 Pac. 247.

Up to certain limit.—Under the statute of Kansas allowing parties to contract for any rate of interest they may choose, but prohibiting the recovery of more than the principal on 12 per cent per annum, a national bank can not, at the most, receive more than 12 per cent without becoming liable to the penalty provided by Rev. St. U. S., §§ 5197, 5198. *Crocker v. First Nat. Bank*, Fed. Cas. No. 3,397, 4 Dill. 358.

In California, the rate of interest may be agreed upon. The National Banking Act permits a national bank to charge the same rates of interest as state banks may charge under state laws. Held, that a national bank in California may charge such rate of interest as is agreed upon. *Hinds v. Marmolejo*, 60 Cal. 299; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38.

Under laws of Arizona.—The rate of interest which a national bank may charge in Arizona is not limited to 7 per cent by Rev. St. U. S., §§ 5197, 5198, authorizing such banks to charge interest at the rate allowed by the laws of the state or territory where they are located, and allowing only 7 per cent if no rate is fixed by such laws, although St. Ariz., §§ 2161, 2162, allow parties to agree upon any rate, and in default of any agreement to take 7 per cent only, since under these statutes any rate which may be agreed upon is thereby "fixed" by the law. Judgment, 5 Ariz. 409, 53 Pac. 201, affirmed. *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732, expressly overruling *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

Rev. St. U. S., § 5197, provides that any bank may charge interest at the rate allowed by the laws of the state

or territory where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for banks organized or existing in any such state under this title, and, when no rate is fixed by the laws of the state or territory, the bank may charge a rate not exceeding 7 per centum. Section 5198 provides that taking a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the evidence of debt carries with it or which has been agreed to be paid thereon. Rev. St. Ariz. 1887, par. 2161, § 1, provides that, "where there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent per annum on all moneys after they become due." Paragraph 2162, § 2, provides that "parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract." Held, that a national bank in Arizona may charge any rate of interest which may be agreed on. *Daggs v. Phoenix Nat. Bank*, 5 Ariz. 409, 53 Pac. 201, affirmed in 177 U. S. 549, 44 L. Ed. 882, 20 S. Ct. 732.

⁹⁷ See post, "Action for Penalty or to Recover Back Usury Paid," § 270 (11).

98. Defense to action by bank.—*Cox v. Beck*, 83 Fed. 269; *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387; *Chase Nat. Bank v. Faurot*, 72 Hun 373, 25 N. Y. S. 447, 55 N. Y. St. Rep. 179, affirmed in 149 N. Y. 532, 44 N. E. 164, 35 L. R. A. 605; *First Nat. Bank v. Anderson*, 55 App. Div. 570, 67 N. Y. S. 434; *Trabue v. Cook* (Tex. Civ. App.), 124 S. W. 455.

Rev. St., § 5198 (U. S. Comp. St. 1901, p. 3493), providing a penalty against a national bank for usurious transactions, is exclusive, and the usurious interest can not be set off against the principal debt, though the state statutes provide that such a counterclaim may be pleaded. Mer-

rower can not plead usury as a set-off,⁹⁹ recoupment¹ or counterclaim.²

chants' Nat. Bank v. Sharkey Co. (Ore.), 128 Pac. 1005.

Usury in the purchase of a bill or note by a national bank from payee or holder is not available to acceptor or maker as a defense to an action by the banker against him. *Smith v. Exchange Bank*, 26 O. St. 141.

99. Set-Off.—*Danforth v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622, following *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Ellis v. First Nat. Bank*, 11 Ill. App. 275; *Wiley v. Starbuck*, 44 Ind. 298; *Fraker v. Cullum*, 24 Kan. 679; *Marion Nat. Bank v. Thompson*, 101 Ky. 277, 19 Ky. L. Rep. 436, 40 S. W. 903; *Silva v. First Nat. Bank*, 10 Ky. L. Rep. 365; *Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355; *First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; judgment, *Bullmaster v. St. Joseph*, 70 Mo. App. 60, affirmed. *Central Nat. Bank v. Haseltine*, 155 Mo. 58, 55 S. W. 1015, 85 Am. St. Rep. 531, affirmed in *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 46 L. Ed. 118, 22 S. Ct. 50; *Lanham v. First Nat. Bank*, 46 Neb. 663, 65 N. W. 786; *Montgomery v. Albion Nat. Bank*, 50 Neb. 652, 70 N. W. 239; *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073; *Bly v. Second Nat. Bank*, 79 Pa. 453; *First Nat. Bank v. Gruber*, 91 Pa. 377; *Brown v. Second Nat. Bank*, 72 Pa. 209; *Childs v. Alexander*, 22 S. C. 169; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371; *Huggins v. Citizens' Nat. Bank*, 6 Tex. Civ. App. 33, 24 S. W. 926, affirmed in 93 Tex. 664, no op.; *Comanche Nat. Bank v. Dabney (Tex. Civ. App.)*, 44 S. W. 413; *Lomax v. First Nat. Bank (Tex. Civ. App.)*, 39 S. W. 655; *National Bank v. Lynch*, 69 W. Va. 333, 71 S. E. 389; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153; *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113.

A recovery in an action by a national bank of usurious interest can be had only in the manner prescribed by Act Cong. June 3, 1864, and it can not be recovered by way of set-off, or in action to recover back excess of interest paid. *First Nat. Bank v. Gruber*, 91 Pa. 377.

Reasons for rule.—Under the Code of Civil Procedure, § 97 (Ohio Rev. Stat. 1880, § 5075; 2 Bates' Anno. Stat., § 5071), providing that a set-off can only be pleaded in an action founded

on contract, and must be a cause of action arising on contract or ascertained by the decision of a court, the cause of action for the recovery of double the interest paid to a national bank upon a usurious loan can not be used as a set-off in an action by the bank upon other and independent loans. *Barbour v. National Exch. Bank*, 50 O. St. 90, 33 N. E. 542, 20 L. R. A. 192; *Hade v. McVay, etc., Co.*, 31 O. St. 231. See, also, *Shinkle v. First Nat. Bank*, 22 O. St. 516.

Where note renewed.—Interest in excess of the legal rate, received by a national bank, although taken in the renewal of a series of notes, can not be applied by way of set-off or payment

1. Recoupment.—*First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371.

2. Counterclaim.—*Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Slack v. First Nat. Bank*, 44 S. W. 354, 19 Ky. L. Rep. 1684; *National Bank v. Lewis*, 81 N. Y. 15; *Farmers', etc., Bank v. Lang (N. Y.)*, 22 Hun 372; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371; *Comanche Nat. Bank v. Dabney (Tex. Civ. App.)*, 44 S. W. 413.

The maker of a usurious note can not recover the forfeiture by way of a counterclaim, but only in a separate action. *First Nat. Bank v. Moore*, 83 Iowa 740, 48 N. W. 1072.

In an action to recover the amount of a note discounted by a national bank, it can not be counterclaimed that the bank, in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took an unlawful rate of interest. The proper remedy is an action of debt to recover back twice the amount paid. *National Bank v. Lewis*, 81 N. Y. 15, modifying 75 N. Y. 516, 31 Am. Rep. 484.

In a suit by a national bank against all the parties to a bill of exchange discounted by it, to recover the amount thereof, the assignees of the acceptor, who had made an assignment for the benefit of his creditors, can not, having intervened as parties, set up, by way of counterclaim or set-off, that the bank, in discounting a series of bills of said acceptor, the proceeds of which it used to pay other bills, knowingly took and was paid a greater rate of interest than that allowed by law. *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212.

§ 270 (7b) Where Not Paid.—Where usurious interest has not been paid, all interest is forfeited. The bank can recover the principal,³ but no interest.⁴ The borrower is not entitled to have unpaid interest deducted from the face of the loan.⁵

in a suit upon the last of the series. *Driesbach v. National Bank*, 104 U. S. 52, 26 L. Ed. 658; *Farmers', etc., Bank v. Hoagland*, 7 Fed. 159; *Oldham v. First Nat. Bank*, 85 N. C. 240; *National Bank v. Dushane*, 96 Pa. 340.

Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, can not be set off in an action upon the note, as the remedy provided by Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], where such usurious interest has been actually paid—viz, a recovery in an action in the nature of an action of debt of twice the amount of the interest thus paid—is exclusive. Judgment, *Central Nat. Bank v. Haseltine*, 155 Mo. 58, 55 S. W. 1015, 85 Am. St. Rep. 531, affirmed. *Haseltine v. Central Nat. Bank*, 183 U. S. 132, 46 L. Ed. 118, 22 S. Ct. 50.

Under Rev. St. U. S., § 5198, providing for the forfeiture of the entire interest where usury is taken by a national bank, and giving to the person by whom it is paid the right to recover twice the amount of interest paid, a surety, when sued on the last of several renewals of a note, is not entitled to credit by the usurious interest paid by the principal at the time of the several renewals, but only by the amount withheld by the bank when the original note was executed, where the right of the principal to recover the penalty is barred by a judgment dismissing, as settled, an action brought by him to recover the penalty. *Faulkner v. Marion Nat. Bank*, 19 Ky. L. Rep. 1268, 43 S. W. 249.

Where note discounted.—Where a national bank discounts drafts at an illegal rate, the transfer of the drafts to it is a "payment" of the interest, within the principle that a payment of usurious interest can not be used as a set-off in a suit by the bank on the paper discounted; therefore an acceptor is liable for the face of the drafts, though the bank paid less for them. *Danforth v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622. But see post, "Where Not Paid," § 270 (7b), for cases holding discount does not amount to a payment.

Usury on another loan.—National

Banking Act 1864, § 30, authorizes a recovery from the bank of twice the amount of usurious interest paid to it. Code Civ. Proc., § 97, provides that a set-off can only be pleaded in an action on contract. A borrower, having paid usurious interest on one loan, was sued by the bank on another, against which he sought to set off the penalty for taking the usurious interest. Held, that the right to recover the usurious interest did not arise on contract, and hence was not available as a set-off. *Hade v. McVay, etc., Co.*, 31 O. St. 231.

Neither principal nor surety can set off, in an action on a promissory note, usurious interest paid on the note. *Stephens v. Monongahela Bank*, 111 U. S. 197, 28 L. Ed. 399, 4 S. Ct. 366, following *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212.

Contra.—Where a national bank sues on a note on which it has received usurious interest, the defendant may set off the excess of interest or discount paid from time to time on the usurious loan. *Brown v. Second Nat. Bank*, 72 Pa. 209.

In an action by a national bank, the defendant may set off the amount of usurious discounts on previous transactions. The interest paid by him, beyond that authorized by the Bank Act of 1864, belongs to him, and the bank can hold it only for his use. *Lucas v. Government Nat. Bank*, 78 Pa. 228, 21 Am. Rep. 17, overruled in *National Bank v. Dushane*, 96 Pa. 340, which conforms to the above list of cases.

3. Where not paid.—*Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Slade v. Squier*, 133 App. Div. 666, 118 N. Y. S. 278.

4. Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; *Danforth v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622; *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474; *Tomblin v. Higgins*, 53 Neb. 92, 73 N. W. 461, 68 Am. St. Rep. 596, reversed in 78 N. W. 620; *Wachovia Nat. Bank v. Ireland*, 122 N. C. 571, 29 S. E. 835; *Huntington v. Krejci*, 3 O. Dec. 532.

5. Interest not deducted.—In an action by a national bank on a promissory note on which it has received

Where Note Discounted.—If the bank has discounted a note at a usurious rate it can recover only the face of the note.⁶ If the bank reserved a greater discount than is legal, paying the borrower the amount called for by the note, less the legal discount, only the amount actually paid can be recovered in an action for a penalty as in such case the interest can not be said to have been paid.⁷ It is competent to show, in an action by a national bank on notes discounted by it, the amount for which it bought them.⁸

Who May Make Defense.—An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest.⁹ Where an action is brought nominally upon a promissory note, which was held as collateral by a national bank for overdrafts upon it by another bank, the suit is actually to recover the overdrafts against the makers of the note as sureties, and, if usurious interest has been charged, the makers may defalcate all the interest charged against the whole amount of overdrafts claimed.¹⁰ A promissory note, valid in its inception and unaffected by usury, was discounted by the plaintiff for the payee at a rate greater than the legal interest. The defendant, maker of the note, can, not, under the federal banking act, set up in his defense usury in the contract of indorsement. The plaintiff is entitled to recover the full amount of principal and interest due on the note.¹¹

Sufficiency of Plea or Answer.—In an action by a national bank on a draft discounted by it, an answer averring that the bank discounted the draft at a usurious rate of interest, contrary to the statute, and specifying the interest taken, is not so frivolous as to authorize a judgment for plaintiff on motion, though it does not expressly allege a corrupt intent.¹²

Limitation of Actions.—The two-year provision does not apply to the defense of usury set up in an action by a national bank on a note due it.¹³

usurious interest, the borrower is not entitled to have such interest deducted, but the bank can not recover any unpaid interest. *Huntington v. Krejci*, 3 O. Dec. 532.

6. **Note discounted.**—*First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *National Bank v. Lewis*, 81 N. Y. 15; *Hade v. McVay, etc., Co.*, 31 O. St. 231.

7. *National Bank v. Lewis*, 81 N. Y. 15.

8. *First Nat. Bank v. Haulenbeek*, 19 N. Y. S. 567, 65 Hun 54.

9. *Trabue v. Cook* (Tex. Civ. App.), 124 S. W. 455.

10. **Who may make defense.**—Nor does the fact that the bank which had made the overdrafts charged illegal interest to their customers on the notes discounted for it by the national bank affect the right of the sureties to set up, as against the national bank,

its violation of the act of congress, in charging usurious interest. *Third Nat. Bank v. Miller*, 90 Pa. 241.

11. *Importers', etc., Nat. Bank v. Littell*, 47 N. J. L. 233.

12. *National Bank v. Orcutt* (N. Y.), 48 Barb. 256.

13. **Limitation of actions.**—*Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187.

Such defense is not limited to two years after the unlawful receiving of interest. The limitation of two years applies to the time within which an action must be brought to recover back twice the amount of unlawful interest paid. *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474; *S. C.*, 133 Mass. 248, 43 Am. Rep. 509. See post, "Action for Penalty or to Recover Back Usury Paid," § 270 (11).

§ 270 (8) Whether Payments Made Shall Be Applied to Principal or Forfeited Interest.—A payment to the bank by the borrower, without any direction as to its application, must be applied to the principal and not to forfeited usurious interest thereon.¹⁴ But the right to have such payments applied to the payment of the principal is lost after the expiration of two years after such payment.¹⁵

Applied to Interest.—Where various payments had been made by the borrower, which were deducted from old notes, and new notes given for the balances, the payments should be applied to the interest.¹⁶ An applica-

14. Payments applied to principal.—*First Nat. Bank v. Turner*, 3 Kan. App. 352, 42 Pac. 936; *First Nat. Bank v. McInturff*, 3 Kan. App. 536, 63 Pac. 839; *Silva v. First Nat. Bank*, 10 Ky. L. Rep. 365; *Citizens' Nat. Bank v. Donnel*, 172 Mo. 384, 72 S. W. 925, affirmed in 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187; *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364; *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759; *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

When partial payment is made to a national bank under a contract to pay usurious interest, in the absence of a stipulation as to how the payment shall be appropriated, the law will apply it in liquidation of that portion of the contract which is legal, and the bank may afterwards avoid the penalty fixed by act of congress for collecting usurious interest by relinquishing claim for it. *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

Where a national bank purchases accepted drafts at a usurious discount, and the acceptor makes a payment to the bank without any direction as to its application, it can not be applied to the forfeited interest, but must be credited on the face value of the drafts. *Danforth v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, 17 L. R. A. 622.

All payments made by the maker of a note will be deducted from the amount of the original debt, where they are set up in defense to an action on the note. *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474.

Where a borrower from a national bank under a contract providing for usurious interest made no specific appropriation of a payment to interest, the bank had no right to appropriate any part of such payment to the interest account, but was required to apply the same in extinguishment of the principal. *Second Nat. Bank v.*

Fitzpatrick, 27 Ky. L. Rep. 283, 84 S. W. 1150.

Necessity for specific application.—Where a national bank contracts for interest at a usurious rate, it at once forfeits all interest, and unappropriated payments subsequently made by the debtor must be first applied to the principal, so that while any part of the principal remains unpaid there is no payment of usurious interest, and no right to recover the penalty for taking usury accrues, unless payments made by the debtor are specifically applied by him to usurious interest. *Citizens' Nat. Bank v. Forman*, 111 Ky. 206, 23 Ky. L. Rep. 613, 63 S. W. 454, 56 L. R. A. 673.

Payments made generally on a note securing a usurious loan will be applied in satisfaction of the principal. *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364.

15. *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759.

16. Applied to interest.—In an action against a national bank to recover usurious interest paid, and also a penalty, it appeared that various payments had been made by plaintiff, a borrower, which were deducted from old notes, and new notes given for the balances. Held, that defendant could not apply the payments first to interest, in the absence of an agreement to that effect. *Kinser v. Farmers' Nat. Bank*, 58 Iowa 728, 13 N. W. 59.

Usurious interest, actually paid to a national bank on discounting and renewing a series of notes, can not in an action by the bank on the last of them be applied in satisfaction of the principal of the debt. *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

"Lynch v. Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520, is a case very different from this and the decision in that case has no application

tion by a national bank of a payment on a usurious note to payment of the usurious interest, with the knowledge and consent of the maker, so that the two-year limitation for recovery of the penalty begins to run, is shown, where on the back of the note is indorsed interest paid at a usurious rate, and such note is taken up and a new note given for the amount remaining unpaid after allowing such usurious rate.¹⁷

Applied to Principal and Interest.—The plaintiff borrowed large sums of a national bank at usurious interest, made payments from time to time, and at his occasional settlements gave his notes for the balance due after deducting his payments from the principal and interest. The payments must be held to have been applied pro rata to the principal and interest.¹⁸

Paid after Maturity.—Where a national bank discounts a draft before maturity at an illegal rate of interest, the interest-bearing capacity of the draft after, as well as before, maturity is destroyed, and an amount paid on the draft after maturity thereof must be credited on the principal of the draft, without regard to when the interest thereon accrued.¹⁹

§ 270 (9) Amount or Extent of Penalty for Taking Usury—§ 270 (9a) In General.—The only penalties incurred by the bank for taking usury, so far as concerns the debtor, are the forfeiture of the unpaid interest, and a penalty of twice the amount of interest that has been paid, if sued for within two years.²⁰ The usurious contract destroys the interest-bearing quality of the paper.²¹

Act of Congress Governs.—National banks are subject only to the penalties prescribed by the United States Banking Act for taking usury.²²

Whether or Not Rate Fixed by State Law.—The bank incurs the penalty both where the maximum rate of interest is fixed by the state law

here. That was an action to recover double the amount of the usurious interest paid the bank by the plaintiff, while this is an action in which the defendants are attempting to set off usurious interest paid against the principal of the debt sued on. The former is expressly authorized by the act of congress, while the latter can not be done according to the authorities before cited." *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113.

17. *McCarthy v. First Nat. Bank*, 23 S. Dak. 269, 121 N. W. 853.

18. *Kinser v. Farmers' Nat. Bank*, 58 Iowa 728, 13 N. W. 59.

19. *National State Bank v. Brainard*, 61 Hun 339, 16 N. Y. S. 123, 40 N. Y. St. Rep. 540.

20. **Amount of penalty.**—*Wiley v. Starbuck*, 44 Ind. 298.

The Act of 1864 provides for the forfeiture of double the interest received, or a forfeiture of the entire interest

when unpaid. *Hade v. McVay, etc., Co.*, 31 O. St. 231.

21. *Quint v. First Nat. Bank*, 9 Kan. App. 474, 58 Pac. 1010.

22. **Act of congress governs.**—*Merchants', etc., Nat. Bank v. Myers*, 74 N. C. 514.

"Where a national bank loans money upon a usurious contract, such penalties, and only such, can be enforced as are provided in the National Banking Act." *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995.

Where state law provides no penalty.—Although the usury law of May 28, 1858, imposes no penalty for taking a greater rate than 6 per cent, yet no greater rate is "lawful," within Rev. St. U. S., § 5197; and, if a national bank in that state takes more than 6 per cent interest, it becomes liable for the penalty imposed on it by § 5198. *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65.

and where it is not fixed by the state law but declared by the act of congress to be seven per centum.²³

§ 270 (9b) Where Interest Actually Paid.—The act of congress, in regard to the consequences of taking usury, provides that, in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.²⁴ There is conflict as to the construction of this provision. The majority of the cases hold that the amount of the penalty recoverable in an action against national banks is twice the whole amount of the interest paid, and not merely twice the amount paid in excess of the legal rate.²⁵ Other cases

23. Whether or not fixed by state law.—Act Cong. June 3, 1864 (13 Stat. 99), § 13, provides that every national bank may take on any loan or discount made, or on any note, bill of exchange, etc., interest at the rate allowed by the law of the state or territory where the bank is located, and no more, etc.; that, when no rate is fixed by the laws of the state or territory, the bank may take not exceeding 7 per cent; that the knowingly taking "a rate of interest greater than aforesaid" shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid; and, in case such greater rate of interest has been paid, it may be recovered back; and the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. Held, that the quoted words do not refer simply to the preceding sentence, which relates to banks where no rate of interest is fixed by law, so as to leave the consequences of usury where such rate is fixed to be governed wholly by the local law on the subject, but they relate to the preceding clause as well. Even if the quoted words have reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law, the law of the state where the bank is located, including its penalties, would not apply. *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

24. Rev. St., § 5198, 5 Fed. St., p. 133.

25. Twice amount of entire interest.—*Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 46 L. Ed. 475, 22 S. Ct. 457; *Louisville Trust Co. v. Kentucky Nat. Bank*, 102 Fed. 442; *Hill v. National Bank*, 15 Fed. 432, 21 Blatchf. 258; *Markson v. First Nat. Bank*, Fed. Cas. No. 9,097; *Crocker v. First Nat. Bank*, Fed. Cas. No. 3,397, 4 Dill. 358; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143; *National Bank v. Davis*, Fed. Cas. No. 10,038, 8 Biss. 100; *National Exch. Bank v. Moore*, Fed. Cas. No. 10,041, 2 Bond. 170; *First Nat. Bank v. McInturff*, 3 Kan. App. 536, 63 Pac. 839; *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; *National Bank v. Johnson*, 91 Ky. 181, 12 Ky. L. Rep. 759, 15 S. W. 134; S. C., 11 Ky. L. Rep. 904; *Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228, 23 Ky. L. Rep. 610, 62 S. W. 459, 62 L. R. A. 599; *Watt v. First Nat. Bank*, 76 Minn. 458, 79 N. W. 509; S. C., 79 Minn. 266, 82 N. W. 1118, affirmed. *First Nat. Bank v. Watt*, 184 U. S. 151, 46 L. Ed. 475, 22 S. Ct. 457; *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411; S. C., 28 Neb. 684, 45 N. W. 164; *National Bank v. Trimble*, 40 O. St. 629; *Shinkle v. First Nat. Bank*, 22 O. St. 516; *Allen v. First Nat. Bank*, 23 O. St. 97; *Vilas Nat. Bank v. Chambers*, 1 Wkly. L. Bull. 85, 7 O. Dec. 53; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; *Colgin v. City Nat. Bank*, 16 Tex. Civ. App. 346, 40 S. W. 634; *Lasater v. First Nat. Bank*, 96 Tex. 345, 72 S. W. 1057, affirmed in 97 Tex. 638, no op.; *Boerner v. Traders' Nat. Bank*, 90 Tex. 443, 39 S. W. 285; *Smith v. Chilton*, 90 Tex. 447, 39 S. W. 287;

hold that the penalty is twice the amount of the interest paid in excess of the legal rate, and not twice the amount of the entire interest paid legal and illegal.²⁶ The first sentence of the section without the slightest ambiguity provides for the forfeiture, not of the amount by which the usurious has exceeded the lawful rate, but of the entire interest. When the statute then proceeds, in the very next sentence, to say "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back * * * twice the amount of the interest thus paid," it can not in reason be held that the words, "the interest thus paid," refer to any other sum than the entire interest as provided in the previous sentence. To hold otherwise would be to decide that the statute forfeited the entire amount of interest whenever a usurious rate had been taken, received, reserved or charged, and yet limited the debtor's right to recover back only to twice the amount of the excess of the usurious over the legal rate. This would be to interpret the law as in one sentence imposing a forfeiture of the entire interest, whilst in the next sentence it rendered such forfeiture, in many cases, absolutely nugatory. That such would be the result becomes apparent when it is considered that whilst it is conceded that in case usurious interest is received the entire amount is forfeited, it is yet argued that in case suit is brought to recover the forfeited usurious interest, the entire interest received can not be awarded.²⁷

Interest on Penalty.—The sum which may be recovered back is not a debt, but a penalty, and hence does not bear interest.²⁸

Stout v. Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808.

Where usurious interest has been actually paid, double the amount thereof may be recovered from a national bank, under the provisions of Rev. St., § 5198. *Markson v. First Nat. Bank*, Fed. Cas. No. 9,097.

26. Twice amount of excessive interest.—*Hintermister v. First Nat. Bank*, 64 N. Y. 212; modifying 3 Hun 345; *Brown v. Second Nat. Bank*, 72 Pa. 209; *Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371; *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821; *Cheek v. Merchants' Nat. Bank*, 57 Tenn. (10 Heisk.) 618.

27. "Whilst the question here presented has not been heretofore passed upon by this court, the circuit courts of the United States have had occasion frequently to consider it, and have uniformly construed the statute in accordance with its plain import as we have just expounded it. *National Bank v. Davis*, Fed. Cas. No. 10,038, 8 Biss. 100; *Bank v. Moore* (U. S.), 2 Bond, 174; *Crocker v. First Nat. Bank*,

Fed. Cas. No. 3,397, 4 Dill. 358; *Hill v. National Bank*, 15 Fed. 432, 21 Blatchf. 258; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143; S. C., 102 Fed. 442. The state courts of last resort have also, as a general rule, upheld the same construction. *Boerner v. Traders' Nat. Bank*, 90 Tex. 443, 39 S. W. 285, and authorities there cited. True it is that in a few cases some state courts have hesitatingly taken an opposite view; but we think, for the reasons which we have given, the letter of the statute is too plain and its intention too manifest to justify such an interpretation." *First Nat. Bank v. Watt*, 184 U. S. 151, 46 L. Ed. 475, 22 S. Ct. 457.

28. Interest on penalty.—*Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759; *Columbia Nat. Bank v. Bletz* (Pa.), 2 Penny. 169; *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821.

A judgment against a national bank for twice the amount of interest paid, as a penalty for taking usury, should have allowed interest from the date of filing the petition to recover the penalty; that being the date of the

§ 270 (9c) Where Interest Not Paid—§ 270 (9ca) In General.

—The taking, receiving, reserving, or charging a rate of interest greater than is allowed by law, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.²⁹ There is no conflict as to construction of this provision. The cases which hold that excessive interest only is recoverable where actually paid, distinguish the two statutory provisions, and hold that the entire interest and not merely the usurious interest is forfeited.³⁰

§ 270 (9cb) Interest Discounted.—Where the usurious interest is discounted from the face of the note, the bank can only recover the face of the note less the interest deducted.³¹

§ 270 (9cc) Interest on Renewal Note.—Where the illegal interest on the original note is incorporated into a renewal note, the whole interest on both notes will be disallowed;³² but where usurious interest is not reserved in the renewal note, the interest on the old note will be disallowed, but the renewal note will bear interest.³³ Where a national bank has charged usurious interest on a series of renewal notes, the taint of usury follows through the whole line, and the bank forfeits all the interest

first demand therefor. *Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228, 23 Ky. L. Rep. 610, 63 S. W. 459, 62 L. R. A. 599.

29. Interest not paid.—Rev. St., § 5198, 5 Fed. St., p. 133.

Where the interest has not been paid, the entire interest, and not merely the usurious interest, is forfeited, and should be deducted in an action by the bank for the money loaned. *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364; *Hade v. McVay, etc., Co.*, 31 O. St. 231; *Shunk v. First Nat. Bank*, 22 O. St. 508, 10 Am. Rep. 762; *Shinkle v. First Nat. Bank*, 22 O. St. 516; *First Nat. Bank v. McCarthy*, 18 S. Dak. 218, 100 N. W. 14.

The original Act of February, 1863 (12 U. S. Stat. 678, § 46), in case illegal interest was taken or reserved, forfeited the entire debt. *Hade v. McVay, etc., Co.*, 31 O. St. 231.

30. Hintermister v. First Nat. Bank, 64 N. Y. 212.

31. Where interest discounted.—*Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411; *S. C.*, 24 Neb. 325, 40 N. W. 413; *National State Bank v. Brainard*, 61 Hun 339, 16 N. Y. S. 123, 40 N. Y. St. Rep. 640.

Where a national bank has discounted paper at a usurious rate, and then brings action thereon against the indorser, it can recover only the

amount paid defendant, without legal interest, as the entire interest is forfeited. *Lucas v. Government Nat. Bank*, 78 Pa. 228, 21 Am. Rep. 17.

32. Interest on renewal note.—In rendering judgment on a promissory note given to a national bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest on both notes will be disallowed. *Bank v. Slemmons*, 34 O. St. 142, 32 Am. Rep. 364, distinguishing *Shinkle v. First Nat. Bank*, 22 O. St. 516.

Where, in renewal notes to a bank bearing legal rates, illegal interest is incorporated, the bank can not recover any interest on such renewal notes from the date the interest has been reduced to the legal rate. *Farmers', etc., Bank v. Hoagland*, 7 Fed. 159.

33. Legal interest on renewal.—But where a new note is given in a transaction which amounts to a payment of an old note on which usurious interest was paid, and usurious interest is not reserved on the new note, the new note will bear interest, though a portion of the usurious interest charged on the original note be incorporated in the new note; but the maker of the old note would still have his right to recover double the amount of interest paid thereon. *Shinkle v. First Nat. Bank*, 22 O. St. 516.

paid on the whole series.³⁴ Where a renewal note included the principal of a former note, with usurious interest thereon, and also unlawful interest charges on certain overdrafts, and the long account between the parties was one continuous transaction, the entire transaction was affected with usury from the time that any item thereof became tainted, and subjected the payee to a forfeiture of the entire interest on the former note and on the overdrafts.³⁵

§ 270 (9cd) Interest on Overdrafts.—Where a national bank charges usurious interest on overdrafts, it thereby loses the right to recover any interest at all.³⁶

§ 270 (9ce) Period for Which Forfeited.—There seems to be no settled rule as to the duration of time for which the entire interest is forfeited. It is, of course, forfeited prior to maturity,³⁷ and it has been held that interest accruing after maturity is forfeited, although for a lawful rate.³⁸ In one case it has been held that interest is forfeited until time of bringing suit,³⁹ while in another case it is held forfeited until time of judgment.⁴⁰

34. Series of renewals.—*Cake v. First Nat. Bank*, 86 Pa. 303.

Where a national bank lends money at a usurious rate of interest, and the note therefor is renewed from time to time, usury being embraced in each renewal, the entire interest may be eliminated from the last note, so that nothing can be recovered thereon except the original principal. *Peoples v. First Nat. Bank*, 15 Ky. L. Rep. 748.

Where a national bank loaned money at usurious interest, and added it into a note, which was several times renewed at the usurious rate, the bank is only entitled to recover, in an action on the last note, the principal sum originally loaned, less the partial payments made on the notes. *Sydner v. Mt. Sterling Nat. Bank*, 94 Ky. 231, 15 Ky. L. Rep. 4, 21 S. W. 1050.

Where one gives a renewal note in continuation of the same original loan, which was usurious, the taint of usury attaches to such renewal, and all sums paid, either on the original or on the renewal note, should be credited on the amount of the original loan. *Monteith Nat. Bank v. Miller*, 73 Mo. 187.

35. *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, affirmed in 195 U. S. 369, 49 L. Ed. 238, 25 S. Ct. 49.

36. *Third Nat. Bank v. Miller*, 90 Pa. 241.

37. Before maturity.—Where a national bank discounts a draft before maturity at an illegal rate of interest and reserves the discount, the bor-

rower receiving the amount of the draft, less the discount reserved, all interest on such draft accruing prior to maturity will be forfeited by the bank, under Rev. St. U. S., § 5198, which prohibits a national bank from reserving a greater rate of interest on loans than is allowed by the law of the state where the bank is situated. *National State Bank v. Brainard*, 61 Hun 339, 16 N. Y. S. 123, 40 N. Y. St. Rep. 640.

38. After maturity.—*First Nat. Bank v. Stauffer*, Fed. Cas. No. 4,810a, 1 Fed. 187; *Shunk v. First Nat. Bank*, 22 O. St. 508, 10 Am. Rep. 762; but see *Brown v. Marion Nat. Bank*, 92 Ky. 607, 13 Ky. L. Rep. 812, 18 S. W. 635.

Where a national bank receives usurious interest, it forfeits the entire interest on the note, including that accruing after maturity, though the latter rate be lawful. *Shafer v. First Nat. Bank*, 53 Kan. 614, 36 Pac. 998.

39. Time of bringing suit.—A national bank by contracting for usurious interest forfeits all interest only to the date of bringing suit on the note, and judgment for the principal should bear interest at the legal rate from the date of filing the petition. *Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228, 23 Ky. L. Rep. 610, 63 S. W. 459, 62 L. R. A. 599.

40. Time of judgment.—The taking or charging of an excessive rate of interest by a national bank forfeits all interest accruing after maturity of the

§ 270 (10) Effect of Taking Usury upon Contract.—The only forfeiture declared by the National Banking Act is that of the entire interest when usury is charged,⁴¹ and no loss of the whole debt is incurred by the bank.⁴²

Upon Title to Paper.—The title of a national bank to a note which it has discounted is not affected by the fact that the rate of discount was usurious.⁴³

Upon Negotiability.—In an action by a national bank against the maker of a promissory note, the mere fact that the bank discounted the note at a usurious rate does not affect the title or negotiability of the note, and does not, therefore, render it subject to defenses existing between the maker and payee.⁴⁴

debt and before judgment, as well as that accruing before maturity. *Shunk v. First Nat. Bank*, 22 O. St. 508, 10 Am. Rep. 762.

41. See ante, "Amount and Extent of Penalty for Taking Usury," § 270 (9).

42. **Effect of usury on original debt.**—*Hintermister v. First Nat. Bank*, 64 N. Y. 212; *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751.

"The statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal." *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751.

Principal not forfeited.—During the Civil War the only forfeiture declared by the thirtieth section of the Act of June 3, 1864 (13 Stat. 99), is of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon, when the rate knowingly received, reserved, or charged by a national bank is in excess of that allowed by that section; and no loss of the entire debt is incurred by such bank, as a penalty or otherwise, by reason of the provisions of the usury law of a state. *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

Effect on note discounted.—Under the National Banking Law, prohibiting national banks from taking more than a certain rate of interest, and providing that the reserving, receiving, or charging of a greater interest shall be deemed a forfeiture of all interest, and when paid twice the amount may be recovered back, the discounting by such a bank of a note at a usurious interest does not render the note itself void, though § 53 provides that the knowing violation of any provision of

the act shall be ground of forfeiture of all rights granted, to be adjudged by a federal court in a suit by the comptroller. *National Exch. Bank v. Moore*, Fed. Cas. No. 10,041, 2 Bond. 170.

Usury by a national bank in the Indian Territory on a note executed to it did not vitiate the note nor the mortgage given to secure payment thereof, U. S. Comp. St. 1901, p. 3493, prescribing as a penalty where a national bank charges a rate of interest greater than allowed by law a forfeiture of only the interest where it has not been paid, and a right of recovery of twice the amount of the interest where it has been paid. *Meador v. Johnson*, 27 Okl. 544, 112 Pac. 1121.

Effect as to principal and surety.—The reservation of more than the legal sum does not render void, either as to the principal or sureties, a note given for a loan. *Wiley v. Starbuck*, 44 Ind. 298.

Contra holdings.—No privilege of immunity from the usury laws of the states is conferred upon national banks by the Act of Congress of 1864 (13 Stat. 99), and a contract for a loan, made in this state, with one of these organizations, by which it reserves a greater rate of interest than 7 per cent, is void. *First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438.

But it is held in a later case in the same state that a debt contracted or obligation given for a usurious loan made by a state or national bank is not void, but the forfeiture is limited to the interest. *Hintermister v. First Nat. Bank*, 64 N. Y. 212.

43. *Newell v. First Nat. Bank*, 13 Ky. L. Rep. 775.

44. *Nicholson v. National Bank*, 92 Ky. 251, 13 Ky. L. Rep. 478, 17 S. W. 627, 16 L. R. A. 223.

Upon Collateral Security.—The collateral security to the contract is not void.⁴⁵

As to Antecedent Parties.—Where a note or bill is an existing security in the hands of the holder, the usury exacted by a national bank in its acquisition is not available, by way of defense, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate.⁴⁶

§ 270 (11) Action for Penalty or to Recover Back Usury Paid—§ 270 (11a) Jurisdiction.—Of Federal Courts.—Suits, actions and proceedings against any national bank to recover the penalty for usurious interest paid or defenses to actions by national banks to recover usurious interest, may be had in any circuit, district or territorial court of the United States, held within the district in which the bank is established.⁴⁷ In an action in a state court against a national bank to recover usurious interest paid, the right given to such banks to charge the same rate of interest as state banks of issue, is not specially set up or claimed so as to render an adverse decision by the state supreme court reviewable in the United States supreme court, when the only objection made to the complaint is that it fails to state facts sufficient to constitute a cause of action, and this question is argued and determined according to the technical rules of pleading, without any suggestion that defendant may be deprived of some right or privilege given by a statute of the United States.⁴⁸

Of State Courts.—Under the National Banking Act any state, county or municipal court in a county or city in which the bank is located and having jurisdiction in similar cases, has jurisdiction of any suit, action or proceeding against a national bank to recover the penalty for usurious interest paid or to defend against the recovery of usurious interest taken or

45. On collateral security.—The National Banking Act subjecting a bank to liability for taking usurious interest does not declare the contract of indorsement of collateral security to the contract void, and, on such penalty being prescribed, the courts can not superadd it. *Oates v. National Bank*, 100 U. S. 230, 25 L. Ed. 580.

The discounting of a note by a national bank for the principal maker, at a usurious rate of interest, will not discharge the sureties, where there is no intention to practice a fraud on them, and in the absence of any express agreement or understanding that the note was to be used only at a given rate of discount. In such case, the sureties must be held to have trusted the principal as to the terms on which the note might be discounted. *First Nat. Bank v. Garlinghouse*, 22 O. St. 492, 10 Am. Rep. 751. See, also, *Lar-*

well v. Hanover Sav. Fund Soc., 40 O. St. 274.

Enforcible to extent of validity of debt.—A national bank extended the time of payment at a usurious rate, taking therefor notes and a mortgage from the debtor to a third person, who indorsed the notes. Held, that the usury only avoided the interest, and that the bank acquired an equity in the mortgage which was a bona fide security to the extent of the validity of the debt. *Allen v. First Nat. Bank*, 23 O. St. 97.

46. *Smith v. Exchange Bank*, 26 O. St. 141.

47. Rev. St., § 5198, 5 Fed. St. 133.

48. Rev. St., § 5197; *Schuyler Nat. Bank v. Bollong*, 150 U. S. 85, 37 L. Ed. 1008, 14 S. Ct. 24; *S. C.*, 150 U. S. 90, 37 L. Ed. 1010, 14 S. Ct. 26.

received by the bank.⁴⁹ A state court has jurisdiction of an action against a national bank to recover the penalty for receiving usury, provided by the National Banking Act.⁵⁰ The Judiciary Act giving the United States district courts exclusive jurisdiction, only contemplates those penalties and forfeitures of public nature which may be sued for by the government.⁵¹

49. Jurisdiction of state court.—5 Fed. Stat., p. 133, Rev. Stat., § 5198.

Time statute took effect.—Act Cong. Feb. 18, 1875, expressly conferring this jurisdiction, being purely remedial in its character, may be construed to apply where the right of action accrued before its passage as well as after. *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65.

Act Cong. July 12, 1882 (Acts 47th Cong., 1st Sess., c. 290, § 4), conferring jurisdiction upon state courts generally of suits by or against national banks, applies only to suits "hereafter brought;" and only the state courts designated in the amendment of February 18, 1875, had jurisdiction of a suit against a national bank, commenced before the approval of that act, to recover the statutory penalty for taking usurious interest. *Morgan v. First Nat. Bank*, 93 N. C. 352.

50. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37; *Gilman v. Philadelphia* (U. S.), 3 Wall. 713, 18 L. Ed. 96; *Ex parte McNeil* (U. S.), 13 Wall. 236, 20 L. Ed. 624; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995; *National Bank v. Johnson*, 11 Ky. L. Rep. 904; *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; *National Bank v. Johnson*, 91 Ky. 181, 12 Ky. L. Rep. 759, 15 S. W. 134; *City Nat. Bank v. Trimble*, 13 Ky. L. Rep. 204; *Peoples v. First Nat. Bank*, 15 Ky. L. Rep. 748; *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455; *Endres v. First Nat. Bank*, 66 Minn. 257, 68 N. W. 1092; *Schuyler Nat. Bank v. Bollong*, 37 Neb. 620, 56 N. W. 209; *S. C.*, 32 Neb. 70, 48 N. W. 826; 24 Neb. 821, 825, 40 N. W. 411, 413; 28 Neb. 684, 45 N. W. 164, following *First Nat. Bank v. Overman*, 22 Neb. 116, 34 N. W. 107; *Hade v. McVay*, etc., Co., 31 O. St. 231; *Bletz v. Columbia Nat. Bank* (Pa.), 18 Alb. L. J. 231; *First Nat. Bank v. Gruber*, 91 Pa. 377; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; *Bletz v. Columbia Nat. Bank*, 87 Pa. 57, 30 Am. Rep. 343; *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821; *Steadman v. Redfield*, 67 Tenn. (8 Baxt.) 337; *Bobo v.*

People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888; *Dow v. Irasburgh Nat. Bank*, 50 Vt. 112, 28 Am. Rep. 493; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

Jurisdiction derived from state constitution.—Under Rev. St. U. S., § 5198, which provides a penalty for taking usurious interest, and enacts that suits by and against national banks therefor may be brought in any state, county, or municipal court in the county or city in which the association is located "having jurisdiction in similar cases," the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *First Nat. Bank v. Overman*, 22 Neb. 116, 34 N. W. 107.

On defense to suit by bank.—Where a national bank loans money upon a usurious contract, and attempts to enforce such contract in a state court, the plea of usury can be maintained, even though it will operate in some sense as a penalty, and suits for penalties under Rev. St. U. S., § 711, can be enforced only in the United States courts. *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995.

Statute remedial as well as penal.—An action to recover the penalty may be brought in a state court, as the statute is remedial as well as penal. *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455.

Contra.—A bill to recover back usury can not be maintained against a national bank in the Tennessee state courts. *Hambright v. Cleveland Nat. Bank*, 71 Tenn. (3 Lea) 40, 31 Am. Rep. 629.

Courts of equity.—An action against a national bank to recover a penalty for charging usurious interest is a "civil action," within the meaning of Acts, 1877, ch. 97, conferring on the chancery court concurrent jurisdiction with the circuit court of all civil causes of action triable in the circuit court, except in cases of unliquidated damages or injuries to person, character, or property. *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821.

51. *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455.

Against Foreign Bank.—Under the National Banking Act, providing that all actions arising under the National Banking Act may be brought in any state, county, or municipal court in the place in which the bank is located, having jurisdiction in similar cases, the courts of one state have no jurisdiction of an action by a corporation of another state against a national bank located in the latter state to recover the penalty fixed by congress, when such a bank receives more than the lawful rate of interest.⁵² But the forfeiture, where a national bank has received a greater rate of interest on a note than is allowed by law may be availed of in defense of a suit in a state court by the bank upon the note, although the suit is brought in a state other than that of the discount of the note.⁵³

§ 270 (11b) Who May Maintain Action.—The act provides that the penalty for interest paid may be recovered by the person to whom paid or his legal representatives.⁵⁴ The penalty may be recovered by a receiver of an insolvent corporation;⁵⁵ by one of several joint makers,⁵⁶ unless the interest was paid by another maker;⁵⁷ by an assignee in bankruptcy;⁵⁸ and,

52. *Missouri River Tel. Co. v. First Nat. Bank*, 74 Ill. 217.

53. *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474.

54. **Parties.**—Rev. St., § 5198.

The party with whom the bank had the usurious transaction is the party to whom, under The National Banking Act, the forfeiture of interest is to be adjudged, and who, in case the interest has been paid, is authorized to recover back twice the amount. *Smith v. Exchange Bank*, 26 O. St. 141.

The right is personal to the party paying such usurious interest; and an action to recover the same can be maintained only by such person, or his or her legal representative. *Lealos v. Union Nat. Bank*, 9 N. Dak. 60, 41 N. W. 56.

Paid by representative in individual capacity.—A complaint, by an executrix of the will of her deceased husband, to recover double the amount of usurious interest paid for money borrowed from a national bank by her husband during his lifetime, which shows that no payments were made thereon by the husband, and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been borrowed, with lawful interest, and that the additional payments which constituted the usury were made by her in an individual capacity, prior to qualifying as executive, does not state a cause of action in her representative capacity, under Rev. St. U. S., § 5198, giving a party the right to recover double the interest paid to a national bank, when the interest so paid is

greater than allowed by the laws of the state. *Lealos v. Union Nat. Bank*, 9 N. Dak. 60, 41 N. W. 56.

55. **A receiver of an insolvent corporation** is a "legal representative" within the meaning of Rev. St. U. S., § 5198, providing for the recovery by "the person by whom it has been paid, or his legal representatives," in twice the amount, of illegal interest paid a national bank. *Barbour v. National Exch. Bank*, 45 O. St. 133, 12 N. E. 5.

56. **Joint maker.**—*First Nat. Bank v. Gruber*, 91 Pa. 377.

57. **Paid by another maker.**—*First Nat. Bank v. Rowley*, 52 Kan. 394, 34 Pac. 1049.

Under Rev. St., § 5198, which empowers one paying illegal interest to a national bank to recover double the amount paid, one of the joint makers of a note on which illegal interest is charged can not recover the penalty from the bank where the illegal interest was paid by the other maker. *Timberlake v. First Nat. Bank*, 43 Fed. 231.

Where two persons execute a note to a national bank and one of them pays usurious interest thereon, the other can not take advantage of such payment in an action by the bank to collect the note, as the party paying the interest or his legal representatives alone have a right of action to recover the penalty for receiving such interest, and such payment can not be set up as an offset or defense in an action brought by the bank on the note. *Trahe v. Cook* (Tex. Civ. App.), 124 S. W. 455.

58. **Assignee in bankruptcy.**—Where

it has been held, by an assignee for value of the claim;⁵⁹ but not by an indorser of a bill of exchange, where the interest is paid by another;⁶⁰ an assignee for the benefit of creditors;⁶¹ nor by a creditor of the person paying the interest.⁶²

Director of Bank.—Where a national bank made a usurious loan to one of its directors exceeding in amount one-tenth of its paid-up capital, in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest on the ground of usury because of the fact that he is a director of the bank.⁶³

Principal and Surety.—Where the plaintiff, with a surety, executed a note to a national bank, secured by a mortgage of cattle, and afterwards

the party who pays usurious interest to a national bank subsequently becomes bankrupt, his assignee in bankruptcy becomes his "legal representative," and as such may sue for the penalty of double the amount of interest paid. *National Bank v. Trimble*, 40 O. St. 629.

An assignee in bankruptcy seeking to recover from a national bank the penalties imposed by the National Banking Act, Rev. St. U. S., §§ 5197, 5198, for receiving from the bankrupt usurious interest, must, to annul a release executed to the bank by the bankrupt before the commencement of the bankruptcy proceedings, show not only that at its date the bank had reasonable cause to believe that the bankrupt was insolvent, but that the bankrupt executed the release in fraud of Bankrupt Act, Rev. St. U. S., §§ 5128, 5129, as amended by Laws 1874, c. 390, § 11. *Getman v. Second Nat. Bank*, 89 N. Y. 136.

59. Assignee.—The right of a retiring partner in a cause of action to recover usurious interest paid by the firm passes to the remaining partner buying him out and succeeding to the partnership assets and liabilities; the right is not strictly personal, and may be assigned, though the purchasing partner be not deemed a "legal representative" of the other within the meaning of the statute. *Lasater v. First Nat. Bank*, 96 Tex. 345, 72 S. W. 1057.

60. The indorser of a bill of exchange is not the "legal representative," under Act June 3, 1864 (13 Stat. 108), § 30, providing for the recovery of twice the amount of usurious interest from a national bank by the "legal representative" of the person paying such interest. *Barnett v. Muncie Nat. Bank*, Fed. Cas. No. 1,026, affirmed in 98 U. S. 555, 25 L. Ed. 212.

61. Assignee for benefit of creditors.—In Pennsylvania the term "legal representatives" means executors and administrators, in the absence of anything showing that the words are used in different sense; and an assignee for benefit of creditors can not maintain an action in such state, in his own name, against a national bank, to recover the penalty for usurious interest paid such bank by the assignor, under Rev. St. U. S., § 5198, authorizing such action by the party paying the illegal interest, or his "legal representatives." *Osborn v. First Nat. Bank*, 175 Pa. 494, 34 Atl. 858, distinguishing *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327.

But it has been held that an assignee for the benefit of creditors under the Kentucky statutes, who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back, under Rev. St., § 5198. The assignee is the assignor's "legal representative" in the meaning of that section. *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143.

62. Creditor of borrower.—A creditor of such person is not his "legal representative," within the meaning of this statute, and can not recover the forfeiture. *Barrett v. National Bank*, 85 Tenn. 426, 3 S. W. 117; *McCreary v. First Nat. Bank*, 109 Tenn. 128, 70 S. W. 821.

Judgment creditor.—The right of action against a national bank for collecting usurious interest, given by Rev. St. U. S., § 5198, to the person paying it "or his legal representatives," is not available to a judgment creditor of such person. *Barret v. Shelbyville Nat. Bank*, 85 Tenn. 426, 3 S. W. 117.

63. Bank v. Slemmons, 34 O. St. 142, 32 Am. Rep. 364.

sold the cattle to the surety in consideration of payment by him of the note and interest to the bank, such payment by the surety operated as a payment by the plaintiff, so as to entitle him to recover the penalty for usury.⁶⁴

Assignment of Right of Action.—Since the federal statute which vested in the person who paid the usurious interest the right to recover back twice the amount of interest thus paid, added the words "legal representatives" as words of survivorship, it follows that the claim being one which will survive the death of the person on whom the right of action is vested, is one which, under the laws of Texas, belongs to his estate, and subsequently one that may be sold or brought like any other chose in action.⁶⁵

Trustee.—One paying the interest merely as the trustee of another, and with the latter's funds, is not entitled to recover the statutory penalty in his own right, although the note on which such payment was made was given by him in his individual capacity, and not as trustee.⁶⁶

Partnership.—The act does not confine the relief thereunder to natural persons, but extends to partnerships.⁶⁷

Joinder of Parties.—Where each of several joint makers of a note has paid his part of the illegal interest out of his individual money they can not unite in one action to recover the penalty.⁶⁸ But they can when payment is made from a joint fund.⁶⁹

§ 270 (11c) Prerequisites to Bringing Suit.—An action for the penalty can not be maintained where plaintiff does not allege or prove that he has paid or tendered the principal sum due.⁷⁰ The mere charging of

64. **Principal and surety.**—*Lasater v. First Nat. Bank* (Tex. Civ. App.), 72 S. W. 1054, reversed in *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 25 S. Ct. 206, on the ground that there was no payment.

65. **Assignment of right of action.**—*Lasater v. First Nat. Bank* (Tex. Civ. App.), 72 S. W. 1054, reversed in *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 25 S. Ct. 206, on the ground that the interest had not been paid.

66. *Pardoe v. Iowa State Nat. Bank*, 106 Iowa 345, 76 N. W. 800.

67. *Albion Nat. Bank v. Montgomery*, 54 Neb. 681, 74 N. W. 1102.

68. *Teague v. First Nat. Bank*, 5 Kan. App. 300, 48 Pac. 603.

69. Two joint makers of a note to a national bank who have separately, but from a joint fund, paid usurious interest on the note, may jointly maintain an action to recover the penalty provided by Rev. St., § 5198 (U. S. Comp. Stat. 1901, p. 3493). *Merchants', etc., Nat. Bank v. Horton*, 27 Okl. 689, 117 Pac. 201.

70. **Necessity for payment or tender.**—*Haseltine v. Central Nat. Bank*, 155 Mo. 66, 56 S. W. 895.

It is only where usurious interest has been actually paid a national bank that a remedy by a suit to recover twice the amount so paid is afforded. *First Nat. Bank v. Clark*, 161 Ala. 497, 49 So. 807; *National Bank v. Lewis*, 81 N. Y. 15. See ante, "Who May Maintain Action," § 270 (11b).

Under Rev. St., § 5198, so long as usurious interest contracted for by a national bank is actually unpaid, it remains interest "agreed to be paid," though incorporated as principal in renewal notes, and renders uncollectible on the debt anything in excess of the principal sum originally loaned. *Judgment* 35 S. W. 926, reversed. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. Ed. 801, 18 S. Ct. 390.

Sale of security.—Usurious interest is not paid a national bank by sale of the mortgaged lands so as to authorize recovery back of same, under Rev. St. U. S., § 5198, where the same is included in a note, and the debtor then

such interest in a running account is not a payment of the same.⁷¹ The giving of a renewal note does not amount to payment.⁷² A discharge of a note by a surety by giving his own note in renewal thereof does not operate as a payment by the principal. Nor does the subsequent payment of the renewal note by the surety operate to give the principal a cause of action.⁷³ But the payment of the principal of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid on such loan.⁷⁴

§ 270 (11d) Form of Action.—The act of congress provides for an action in the nature of an action of debt.⁷⁵ Either debt or assumpsit will lie by a borrower against a national bank to recover the penalty.⁷⁶

Action of Debt.—The National Bank Act having prescribed that, as a penalty against a national bank for taking a greater rate of interest than that allowed by law, the person paying such unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure.⁷⁷

Statutory Remedy Exclusive.—This remedy is exclusive,⁷⁸ and can

gives bonds secured by trust deed therefor, and, in action to foreclose, usury is set up, and the amount thereof deducted by the judgment from the amount due on the bonds. *Talbot v. First Nat. Bank*, 106 Iowa 361, 76 N. W. 726, affirmed 185 U. S. 172, 46 L. Ed. 857, 22 S. Ct. 612.

The discounting by a national bank of a note at a usurious rate of interest is merely the "charging" or "reserving" of usury, and not the "taking" or "receiving" of usury; and the debtor's right of action under Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], to recover twice the amount of usurious interest paid, does not accrue when the note is discounted. *Citizens' Nat. Bank v. Forman*, 111 Ky. 206, 23 Ky. L. Rep. 613, 63 S. W. 454, 56 L. R. A. 673. See ante, "Usury as Defense or Set-Off or Counterclaim in Action by Bank," § 270 (7).

71. Davey v. First Nat. Bank, 8 S. Dak. 214, 66 N. W. 122.

72. The giving of a renewal note will not sustain a recovery from a national bank, under Rev. St. U. S., § 5198 [U. S. Comp. St. 1901, p. 3493], on account of usurious interest in the original note, since the payment contemplated by that statute is an actual payment, and not a further promise to pay. *Judgment, Lasater v. First Nat. Bank* (Tex. Civ. App.), 72 S. W. 1054, reversed. *First Nat. Bank v. Lasater*,

196 U. S. 115, 49 L. Ed. 408, 25 S. Ct. 206.

73. Lasater v. First Nat. Bank, 40 Tex. Civ. App. 237, 88 S. W. 429.

74. Payment of principal.—*Exeter Nat. Bank v. Orchard*, 43 Neb. 579, 61 N. W. 833; *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327; *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

There may be payments of usurious interest as such which will entitle a debtor to recover of a national bank the penalty for taking usury, though the principal sum remains unpaid; and such a case is presented where the interest upon one note is included in the amount of another note, and the other note is subsequently paid in full. *Second Nat. Bank v. Fitzpatrick*, 111 Ky. 228, 23 Ky. L. Rep. 610, 63 S. W. 459, 62 L. R. A. 599.

75. Form of action.—Rev. St., § 5198.

76. Lynch v. Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520, reaffirmed in *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153.

77. Action of debt.—*Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Brown v. Marion Nat. Bank*, 92 Ky. 607, 13 Ky. L. Rep. 812, 18 S. W. 635; *National Bank v. Lewis*, 75 N. Y. 516, 31 Am. Rep. 484; *National Bank v. Dushane*, 96 Pa. 340.

78. Exclusive remedy.—*First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371; *Lomax v. First Nat. Bank* (Tex. Civ. App.), 39 S. W. 655; *Charleston*

not be supplemented by the statute of a state on that subject.⁷⁹ But it has been held that, in an action against a national bank to recover the penalty for taking usurious interest, the form of the suit, including the proper party plaintiff, must be determined by the law of the place where the action is brought.⁸⁰

§ 270 (11e) Pleadings.—In an action against a national bank to recover twice the amount of interest paid to the bank under a usurious contract, the petition need not refer to the statute authorizing the suit.⁸¹ A petition to recover the penalty must charge that the act was knowingly done.⁸² A complaint against a national bank for usury need not allege that there are no state banks of issue which are by law allowed to charge the rate claimed to be usurious, such fact, if shown to exist, being a bar to the action.⁸³

§ 270 (11f) Defenses to Action for Penalty.—Set-Off.—The bank can not set off a claim against the borrower in an action for the penalty.⁸⁴ But, it has been held, that, after both parties have reduced their claims to

Nat. Bank v. Bradford, 51 W. Va. 255, 41 S. E. 153; *National Exch. Bank v. Boylen*, 26 W. Va. 554, 53 Am. Rep. 113.

One who, in the federal court, has recovered a penalty of a national bank, which collected usury of him, can not thereafter recover in assumpsit in a state court the excess upon the legal interest paid to the bank, as the remedy provided by the federal statute is exclusive. *Hill v. National Bank*, 56 Vt. 582. See ante, "What Law Governs—Application of State Laws," § 270 (1).

79. Remedy under state statute.—*Stephens v. Monongahela Bank*, 111 U. S. 197, 28 L. Ed. 399, 4 S. Ct. 366, 367; *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Wiley v. Starbuck*, 44 Ind. 298; *Huntington v. Krejci*, 3 O. Dec. 532; *First Nat. Bank v. Gruber*, 91 Pa. 377; *Hill v. National Bank*, 56 Vt. 582.

The only remedy open to a party aggrieved by the action of a national bank in taking usurious interest is that prescribed by the act of congress—a separate action for double the interest paid by him. *Oldham v. First Nat. Bank*, 85 N. C. 240.

Act relating to removal of causes.—Act Cong. March 3, 1887, § 4, relating to the removal of causes, as corrected by Act Cong. Aug. 13, 1888, providing that all national banks shall be deemed citizens of the states in which they are located for the purpose of all actions by or against them, does not subject

national banks to the laws of the states in which they are located as to remedies of the debtor for exaction by the creditor of usurious interest. *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073.

80. *Osborn v. First Nat. Bank*, 175 Pa. 494, 34 Atl. 858.

81. Pleadings.—*Henderson Nat. Bank v. Alves*, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132.

82. *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411.

A complaint which alleges that defendant knowingly and usuriously received from plaintiff, for interest, a certain sum, being at the rate of 24 per centum per annum, and gives time, amount, etc., states a good cause of action for recovery, under the National Banking Act. *Guild v. First Nat. Bank*, 4 S. Dak. 566, 57 N. W. 499.

83. *Morgan v. First Nat. Bank*, 93 N. C. 352.

84. Set-off.—In suit against a national bank, to recover the penalty imposed by Rev. St. U. S., § 5198, for taking usurious interest, defendant can not set off a judgment or other claim held by it against plaintiff. *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65.

In an action brought by the receiver of A's property against a national bank, under Rev. St. U. S., § 5198, to recover penalties for taking unlawful interest, the bank can not set off a balance due from A. on an unpaid note. *Morehouse v. Second Nat. Bank (N. Y.)*, 30 Hun 628.

judgments, the bank may set off the judgment in its favor against the judgment for the penalty.⁸⁵

Pendency of Another Suit.—Where it appears that the plaintiff in an action against a national bank to recover usurious interest is the beneficial owner of the notes discounted, the fact that a suit by a joint maker was pending in another court for the recovery of such usurious interest is no bar to the action.⁸⁶

Estoppel of Plaintiff.—See elsewhere.⁸⁷

§ 270 (11g) Limitation of Actions.—The National Banking Act provides that an action to recover usurious interest paid must be brought within two years from the time the usurious transaction occurred.⁸⁸

When Action Accrues.—The right to maintain an action to recover the penalty prescribed accrues as soon as any unlawful interest is paid, and the two-years limitation begins to run from the time such payment is made.⁸⁹

85. After claims reduced to judgments.—Where a manufacturing company, incorporated under the laws of Ohio, borrowed money of a national bank, at a usurious rate of interest, and gave its note therefor to the bank, payable at a future day, and the bank, for the accommodation of the company, discounted, from time to time, sundry promissory notes indorsed by the company to the bank in the ordinary course of business, and before maturity of any of the notes, the company became insolvent, and a receiver was appointed, who took charge of all its property and assets and the receiver thereafter recovered a judgment against the bank for twice the amount of interest paid by it to the bank on the note on which the usurious interest had been paid, and, subsequently to the recovery of that judgment, the bank obtained two judgments in the same court in which the receiver brought his action—to wit, one for the balance due on the usurious note against the company and its sureties on the note, and one against the company for the amount due on the discounted promissory notes indorsed by the company to the bank—in an action to enjoin the collection of a balance due on the judgment in favor of the receiver and for other relief, it was held that after the appointment of the receiver, and the rendition of judgment on the respective claims of the company and the bank, the judgments in favor of the bank were, upon principles of equity, a proper subject of set-off against the judgment in favor of the receiver. *Barbour v. National*

Exch. Bank, 50 O. St. 90, 33 N. E. 542, 20 L. R. A. 192.

86. *First Nat. Bank v. Gruber*, 91 Pa. 377.

87. See ante, "Defenses to Action for Penalty," § 270 (11f).

88. Limitation of actions.—Rev. St., § 5198, 5 Fed. St. 133; *National Bank v. Davis*, Fed. Cas. No. 10,038, 8 Biss. 100; *Talbot v. First Nat. Bank*, 106 Iowa 361, 76 N. W. 726, affirmed in 185 U. S. 172, 46 L. Ed. 857, 22 S. Ct. 612; *National State Bank v. Boylan* (N. Y.), 2 Abb. N. C. 216; *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759.

89. When action accrues.—*Kinser v. Farmers' Nat. Bank*, 58 Iowa 728, 13 N. W. 59; *Brown v. Marion Nat. Bank*, 92 Ky. 607, 13 Ky. L. Rep. 512, 18 S. W. 635; *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; *Hall v. First Nat. Bank*, 30 Neb. 99, 46 N. W. 150; *First Nat. Bank v. Smith*, 36 Neb. 199, 54 N. W. 254; *National Bank v. Carpenter*, 52 N. J. L. 165, 19 Atl. 181; *Carpenter v. National Bank*, 50 N. J. L. 6, 11 Atl. 478; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *National Bank v. Trimble*, 40 O. St. 629; *Shinkle v. First Nat. Bank*, 22 O. St. 516; *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327; *Stephens v. Monongahela Nat. Bank*, 88 Pa. 157, 32 Am. Rep. 438; *Brown v. Second Nat. Bank*, 72 Pa. 209; *McCarthy v. First Nat. Bank*, 23 S. Dak. 269, 121 N. W. 853; *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808; *Lasater v. First Nat. Bank* (Tex. Civ. App.), 72 S. W. 1054, affirmed in

The limitation does not begin to run from the time of the agreement for such interest, but from the time of the receipt of the money by the bank.⁹⁰ The limitation runs from the time the note is discounted and the usurious interest reserved from the proceeds.⁹¹ Each payment of such interest is a transaction, and the limitation commences to run from that time, although the debt on which such interest was paid remains unpaid.⁹²

On Renewal Note.—Where a note has been renewed, interest on the old note paid more than two years before commencement of suit can not be recovered.⁹³ An action against a national bank to recover the penalty for usury, in the case of successive renewal notes, accrues at the time the payment is actually made or judgment is entered therefor.⁹⁴

97 Tex. 638, no op.; S. C., 96 Tex. 345, 72 S. W. 1057; *National Bank v. Ragland* (Tex. Civ. App.), 51 S. W. 661 (see 93 Tex. 715, no op.); *Boerner v. Traders' Nat. Bank*, 90 Tex. 449, 39 S. W. 285; *Smith v. Chilton*, 90 Tex. 447, 39 S. W. 287; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

Regardless of time of payment of principal.—An action "commenced within two years from the time the usurious transaction occurred," means two years from the time the interest was paid, without regard to payment of the principal. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

The right of action to recover double the amount of usurious interest paid to a national bank accrues upon the actual payment to it by the borrower of the amount of the illegal interest. *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327.

Payment of less than principal.—No action lies by one who has given a note in which unlawful interest is included and paid thereon less than the principal. *Hall v. First Nat. Bank*, 30 Neb. 99, 46 N. W. 150.

90. Time of transaction.—*Carpenter v. National Bank*, 50 N. J. L. 6, 11 Atl. 478.

Contra.—The limitation runs from the date of the usurious transaction, and not necessarily from the payment of the note on which the interest is reserved. *Henderson Nat. Bank v. Alves*, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132.

91. Time of discount.—*Bobo v. People's Nat. Bank*, 92 Tenn. 444, 21 S. W. 888.

The usurious transaction occurred, at the time the bank retained the usurious interest, and not at the time when the discounted note fell due or judgment was rendered thereon. *Bobo*

v. People's Nat. Bank, 92 Tenn. 444, 21 S. W. 888; *First Nat. Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371.

92. *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554, 46 Am. Rep. 520.

93. On renewal note.—Where a national bank discounts a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and the note so discounted is renewed for the same amount from time to time, the borrower paying usurious interest out of his pocket in advance, and suit is brought to recover the loan, usury paid more than two years before the commencement of the suit can not be recovered or credited on the principal of the note. *National Bank v. Davis*, Fed. Cas. No. 10,038, 3 Biss. 100.

Where two years have elapsed since the payment of the usurious interest on a note which has been paid by a new note upon which usurious interest is not charged, the claim of the maker of the old note for double the interest paid thereon can not be allowed as an offset in an action against him on the new note. *Shinkle v. First Nat. Bank*, 22 O. St. 516.

But where a national bank discounts a note at a usurious rate, the maker or his legal representative, on payment of the note, is entitled to recover as a penalty, under Rev. St., § 5198, double the amount of the discount so taken, and of all interest subsequently paid on the note or its renewals, although separate payments of interest were made from time to time after its maturity, and all at legal rates; and limitation does not begin to run against an action to recover such penalty until full payment of the note or its renewals. *Louisville Trust Co. v. Kentucky Nat. Bank*, 103 Fed. 442.

94. *Duncan v. First Nat. Bank*, Fed. Cas. No. 4,135, reversed in Fed. Cas. No. 4,804, on another point.

Application of State Statute.—The period of limitation is governed by the act of congress and a state statute does not apply.⁹⁵

Evidence.—In an action against a national bank to recover the penalty for taking usury, it appears that the transactions between the plaintiff and the bank consists of a large number of loans evidenced by notes, many of which had been from time to time renewed. Evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious.⁹⁶

§ 270 (11h) Burden of Proof.—One who seeks to recover the penalty has the burden of establishing that he has paid a higher rate of interest than the legal rate, and that the bank received it knowingly.⁹⁷ The burden of proof of good faith in assigning a usurious note before maturity and thereby escaping the penalty is upon the bank.⁹⁸

§ 270 (11i) Effect of Recovery of Penalty.—The recovery from a national bank of the penalty, under federal statutes, for taking interest on a note, does not estop the maker from pleading, in an action by the bank to foreclose the collateral mortgage, the satisfaction of the debt by payment of usurious interest on renewals before the bank came into possession of the note.⁹⁹

§ 270 (11j) Compromise and Settlement.—A settlement and release of the penalty made by a member of a copartnership, though with fraudulent intent as to the other partners, is binding on the firm if accepted by the bank in ignorance of such fraudulent intent.¹

95. Application of state statute.—An action in the state court to recover interest paid to a national bank in excess of what is allowed by act of congress, June 3, 1864, is not within the state Act of March 28, 1858, limiting the bringing of the suit to six months. *Lucas v. Government Nat. Bank*, 78 Pa. 228, 26 Am. Rep. 17.

96. *First Nat. Bank v. Barnett*, 51 Neb. 397, 70 N. W. 937.

97. *Merchants', etc., Nat. Bank v. Horton*, 27 Okl. 689, 117 Pac. 201.

98. Burden of proof.—In an action against a national bank to recover, under Rev. St. U. S., §§ 5197, 5198, double the amount of interest paid on a usurious note, defendant is not liable if it proves that it sold and assigned the note before maturity in good faith, and was acting merely as the assignee's agent in collecting it; but the burden of showing good faith is on defendant, no presumption being raised in its favor by the mere fact of assignment. *First Nat. Bank v.*

Miltonberger, 33 Neb. 847, 51 N. W. 232.

99. *Exeter Nat. Bank v. Orchard*, 39 Neb. 485, 58 N. W. 144.

1. Release of right to enforce penalty.—A settlement and release executed by a member of a copartnership to a national bank which had collected usurious interest from the firm, recited: "We (the firm) do renounce and declare to be fully satisfied any and all rights, rights of action, claim, or demand, that we may have or be entitled to under any law of the United States, to recover any sum of money from said Ennis National Bank, by reason of us having paid heretofore to said bank any interest at a greater rate than twelve per cent per annum," held: The release, though it may have been made with fraudulent intent as to the other partners, was binding on the firm when accepted by the bank in ignorance of such fraudulent intent. *Stout v. Ennis Nat. Bank*, 69 Tex. 384, 8 S. W. 808.

§ 270 (12) Criminal Prosecution under State Statute.—National banks are subject to a police law of the state in which they do business, making it a misdemeanor to take illegal interest, since such a law does not interfere with the discharge of its duties to the federal government, the national bank law expressly authorizing a bank to take such interest only as is allowed by the state in which it is located.²

§ 271. Dealings in Exchange, Money and Securities.—A national bank may lawfully acquire title to commercial paper, although it may be unable to show that it has made a profit upon the purchase of the paper.³ It has been held that a national bank can not acquire title to a note by purchase, the purchase of promissory notes not being within the powers conferred upon national banks.⁴

§ 272. Circulating Notes.—Under the provisions of the law regulating national banks the notes of a bank that are authorized to be issued to circulate as money are notes payable on demand, commonly known as national bank notes.⁵

Post Notes.—National banks are prohibited from issuing post notes to circulate as money.⁶ The term post notes, as used in the law providing that no national bank shall issue post notes or any other notes to circulate as money, than such as are authorized therein, does not include time certificates of deposit, representing an actual loan, which are not intended to circulate as money.⁷

Deposit of Security.—The banks are required to deposit with the treasurer bonds of the United States as security for any notes that may be issued, the amount of which can not in any case exceed 90 per cent. of the par value of the bonds. Rev. Stat., § 5171. Should the market or the cash value of the bonds become reduced at any time below the amount of the notes issued, the comptroller of the currency may require that the amount of the depreciation be deposited with the treasurer in other United States bonds, or in money, so long as such depreciation continues. Rev.

2. Criminal prosecution under state statute.—Section 30 of the National Bank Act, declaring what results shall follow the taking by a national bank of a greater interest than that allowed by law, among others a forfeiture of all the interest, is only a declaration of the legal effect of taking unlawful interest upon the rights of the parties under the contract—a civil punishment—and does not prevent the operation of the police laws of the state, making it a misdemeanor to take illegal interest. *State v. First Nat. Bank*, 2 S. Dak. 568, 51 N. W. 587.

3. Blairsville Nat. Bank v. Crabbs, 44 Pa. Super. Ct. 454.

As to banks generally, see ante, "Exchange, Money, Securities and In-

vestments," §§ 188-195.

4. Ridgway v. National Bank, 12 Ky. L. Rep. 216.

5. National bank notes.—*Logan Nat. Bank v. Williamson*, 1 O. C. D. 395, 2 O. C. C. 118.

For treatment of circulating notes of state banks, see ante, "Circulating Notes," III, G.

6. Post notes.—*Logan Nat. Bank v. Williamson*, 1 O. C. D. 395, 2 O. C. C. 118. See ante, "Post Notes and Papers Not Payable on Demand," § 197 (2c).

7. Time certificates of deposit not prohibited.—*Logan Nat. Bank v. Williamson*, 1 O. C. D. 395, 2 O. C. C. 118.

Stat., § 5167. In case of the refusal of a bank to pay its notes, the bonds may be sold at public auction in the city of New York, and their proceeds applied to reimburse the United States the amount expended by them in paying the circulating notes; and for any deficiency which may remain, the United States are entitled to a paramount lien upon all the assets of the bank, which is to be paid in preference to all other claims, except for costs and necessary expenses in administering the same. Rev. Stat., § 5230.⁸

Place for Redemption of National Bank Notes.—A national banking association is allowed to select, subject to certain conditions and the approval of the comptroller of the currency, another such association at which it will redeem its circulating notes at par, but the provision is that nothing in that section shall relieve any such association from its liability to redeem its notes in circulation at its own counter, at par, in lawful money, on demand; and in case of failure so to do, the holder may cause the same to be protested in one package by a notary public, unless the president or cashier of the association which issued the notes, or the president of the cashier of the association designated as the place for redeeming the same, will waive demand, and notice of protest and execute an admission in writing stating the amount demanded and the fact of nonpayment, and it is made the duty of the notary forthwith to forward the admission or notice of protest, as the case may be, to the comptroller of the currency for his information and action in the premises.⁹

§ 273. Actions by or against National Banking Associations—
§ 273½. — Scope of Treatment.—It is intended at this point to give a general treatment of actions by and against national banks, to include the capacity to sue and be sued, jurisdiction and venue, parties, process, appearance, and pleading; also attachment and garnishment, injunction, and execution and enforcement of judgment. Particular actions by and against national banks, and the defenses thereto will be treated under the appropriate sections, as for example: As to actions to enforce the liability of officers of national banks, see ante, "Actions to Enforce Liability," § 254; as to actions to enforce liability of stockholders, see ante, "Actions and Proceedings to Enforce," § 250; as to actions by or against receivers of national banks, see post, "Actions by or against Receiver or Agent," § 287 (4); as to actions against national banks to recover usurious interest paid, see ante, "Action for Penalty or to Recover Back Usury Paid," § 270 (11); as to the defense

8. Deposit of security.—Cook County Nat. Bank *v.* United States, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561. See Rankin *v.* Barton, 199 U. S. 228, 50 L. Ed. 163, 26 S. Ct. 29. And see Van Allen *v.* Assessors (U. S.), 3 Wall. 573, 18 L. Ed. 229, where it is said that the deposit of securities to secure circulation, required by state laws, was for the benefit of the note holders, not of the banks.

State bank notes.—As to deposit of

security for notes of state banks, see ante, "Deposit of Security," § 199.

9. Place for redemption of national bank notes.—First Nat. Bank *v.* National Pahquioque Bank (U. S.), 14 Wall. 383, 20 L. Ed. 840.

Payment of state bank paper.—As to payment or redemption of bank notes or paper issued by state banks, see ante, "Payment or Redemption," § 207.

of ultra vires in actions by or against national banks, see ante, "Effect of Ultra Vires Acts," § 260 (2f); "Effect of Acts Ultra Vires," § 261.

§ 274. — Capacity to Sue and Be Sued.—Capacity to Sue.—A national bank may sue in any court of law and equity as fully as a natural person.¹⁰ Suits may be brought by national banks under § 57 of the National Banking Act of June 3, 1864 (13 Stat. 116), as the word "by," which is omitted in this section, doubtless accidentally, may be supplied from § 59 of the Act of February 25, 1863.¹¹

Reorganization of State Bank.—The change of a state bank to a national bank, with change of name accordingly, does not affect its right to sue on causes of action accruing to it under its former name.¹²

Authority of Attorney.—It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney, under the corporate seal.¹³

What Law Governs.—An action in attachment against a national bank is to be conducted and governed by the laws of the state applicable to attachment suits against natural persons.¹⁴

Liability to Be Sued.—National banks are subject to suit in state courts¹⁵ or in any court of law and equity as fully as natural persons.¹⁶

10. Capacity of national bank to sue.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325. And see *Osborn v. Bank (U. S.)*, 9 Wheat. 738, 6 L. Ed. 204.

National banks can sue and be sued, the same as natural persons. *Talmadge v. Third Nat. Bank (N. Y.)*, 27 Hun 61.

As to the right of a foreign national bank to sue on loans and discounts when made in the state without a compliance with the state law, see ante, "Power of Bank in General," § 269 (1).

11. Effect of omission of word "by" from statute.—*Kennedy v. Gibson (U. S.)*, 8 Wall. 498, 19 L. Ed. 476. See post, "Jurisdiction of Federal Courts," § 275 (1a).

Under Act June 3, 1864, § 57, which gives jurisdiction of national banks to the federal court of the district of the location of such bank, held, that suits may be maintained by as well as against such banks, and the omission of the word "by" in such section was accidental. *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Piss. 82.

12. Conversion of state bank to national bank.—Where a bank, having been originally created by the laws of a state, had, in accordance with the National Banking Act, become a national bank, and its name been changed accordingly, this was without affecting its identity, or its right to sue

upon obligations or liabilities incurred to it by its former name. Act of June 3, 1864, c. 106, § 44; 13 Stat. 112; Rev. Stat., § 5154; *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 35 L. Ed. 841, 12 S. Ct. 60; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162, 12 S. Ct. 450. See ante, "Reorganization of State Banks as National Banks," § 237.

13. Attorney's authority need not be under seal.—*Osborn v. Bank (U. S.)*, 9 Wheat. 738, 6 L. Ed. 204.

14. What law governs.—*First Nat. Bank v. Colby*, 46 Ala. 435.

15. Suable in state courts.—"There is nothing in the banking act, as we read it, which limits a shareholder or shareholders, seeking knowledge for a lawful purpose of an institution in which they have a proprietary interest, to an application to the comptroller for an examination by a public officer of the affairs of their company." It is owned by shareholders, like other banking institutions, and is subject by statute to be sued in the state courts. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

National banks may be sued in state courts. *Hade v. McVay, etc., Co.*, 31 O. St. 231; *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

16. In law or equity as natural persons.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

And such an association may be sued though a receiver has been appointed, and administering its concerns.¹⁷ But a receiver of a national bank, whose operations have been suspended by the comptroller of the currency for causes specified in the National Currency Act, in no sense represents the government, and can not subject it to the jurisdiction of the courts,¹⁸ or even the comptroller himself.¹⁹

§ 275. — Jurisdiction and Venue—§ 275 (1) Jurisdiction in General—§ 275 (1a) Jurisdiction of Federal Courts—§ 275 (1aa) Rule Prior to Act of 1882.—In General.—Prior to July 12, 1882, suits might be brought by or against national banks, in the circuit courts of the United States in the districts where the banks were located. In other words, the mere fact that one of the parties to a controversy was a national bank was sufficient to give jurisdiction to the federal courts.²⁰ Under the express provisions of the Act of 1864, every national bank formed pursuant to the provisions of such act might be sued and by judicial construction might sue in any circuit, district, or territorial court of the United States within which the bank was established,²¹ without regard to the question in contro-

17. After appointment of receiver.—*First Nat. Bank v. National Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Calhoun v. Lanauux*, 127 U. S. 634, 32 L. Ed. 297, 8 S. Ct. 1345.

18. Government's right unaffected.—*Case v. Terrell* (U. S.), 11 Wall. 199, 20 L. Ed. 134.

"The United States can not be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy." *Case v. Terrell* (U. S.), 11 Wall. 199, 20 L. Ed. 134.

19. Comptroller.—Nor can the comptroller of the currency, though he be sued himself and submit to it, subject the government to the jurisdiction of the ordinary courts to determine the conflicting claims of the United States and other creditors in the funds of such a bank. *Case v. Terrell* (U. S.), 11 Wall. 199, 20 L. Ed. 134.

It is doubtful if he has a right to submit himself to the control of the courts in the discharge of duties specially intrusted to him by law. *Case v. Terrell* (U. S.), 11 Wall. 199, 20 L. Ed. 134.

20. Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *First Nat. Bank v. National Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52;

Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234; *County of Wilson v. National Bank*, 103 U. S. 770, 26 L. Ed. 488; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 755.

Section 629, U. S. Rev. Stat., gives the circuit courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties. *County of Wilson v. National Bank*, 103 U. S. 770, 26 L. Ed. 488; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

21. Acts of 1863 and 1864.—Though Act June 3, 1864, § 57, provides only that actions "against" national banks may be brought in district courts of the United States for the districts in which the banks are situate, the act should be read as though it were "by or against." *Commercial Nat. Bank v. Simmons*, Fed. Cas. No. 3,062, 1 Flip. 449.

Suits by bank under act of 1863.—Suits may be brought under § 57 of the act, by any association, as well as against it; though the word "by" be omitted in the next of the section. Reading the section by the light of another section of a prior act, on the same general subject, the omission is

versy,²² amount in controversy,²³ or citizenship of the parties.²⁴ And under Const., art. 3, § 2, limiting the judicial power of the United States to cases arising under the constitution, the laws of the United States and treaties, congress had power to pass such statute.²⁵ Such act conferred on such banks the right to sue in such federal courts, irrespective of the Judiciary Act of 1789; hence the limitations in § 11 of the latter act, as to suits on

to be regarded as an accidental one. *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

"The 59th section of the Act of February 25th, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States or of the state. The 57th section of the Act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word 'by' in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the courts where they can be sued." *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Suit by president of bank on behalf of bank.—Where a bill is brought in the federal court by a person in the capacity of president of a national bank and throughout the case both parties treat it as one by the bank, and not by the president in person, the defendant can not object on appeal that the federal courts are without jurisdiction, upon the ground that the suit is one by the president in person and that he and the defendant are both citizens of the same state. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234.

Suit by bank on behalf of stockholders to enjoin tax on shares.—A suit by a national bank, on behalf of its stockholders, to enjoin an illegal tax on its shares, may be maintained in the United States circuit court. *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052.

22. Without regard to question in controversy.—*Commercial Nat. Bank v. Simmons*, Fed. Cas. No. 3,062, 1 Flap. 449; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Osborn v. Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204; *Bank v. Planters' Bank* (U. S.), 9 Wheat. 904, 6 L. Ed. 244.

Circuit courts have jurisdiction over suits by or against national banks

without regard to question in controversy. *Third Nat. Bank v. Harrison*, 8 Fed. 721, 3 McCrary 162.

A national bank, by reason of its charter as such, may sue in the federal courts. *First Nat. Bank v. Douglas County*, Fed. Cas. No. 4,809, 3 Dill. 298.

The federal courts have jurisdiction over all suits by and against national banks, irrespective of the subject matter. *Foss v. First Nat. Bank*, 3 Fed. 185, 1 McCrary 474.

23. Amount in controversy.—Under Rev. St. U. S., §§ 110, 111, giving the federal circuit courts jurisdiction of all suits by or against any national bank established in the district for which the court is held, such jurisdiction is not dependent on the amount in controversy. *St. Louis Nat. Bank v. Brinkman*, 1 Fed. 45, 1 McCrary 9.

24. Citizenship of parties.—Act June 3, 1864, § 57, which provides that the federal circuit courts shall have jurisdiction of all suits by or against any banking association, etc., gives such court jurisdiction of all actions brought by or against any national banking association established in the district for which the court is held, without regard to the citizenship of the parties, or the amount involved. *Mitchell v. Walker*, Fed. Cas. No. 9,670.

Prior to the Act of July 12, 1882, the federal courts had jurisdiction of all suits by or against national banks without respect to the citizenship of the parties. Revised Statutes, § 629, providing that United States circuit courts shall have jurisdiction of all suits by or against a national bank established in the district in which such court is held, gives such courts jurisdiction of suits by or against a national bank, without regard to the question of citizenship. *County of Wilson v. National Bank*, 103 U. S. 770, 26 L. Ed. 488.

25. Power of congress to pass act.—*Foss v. First Nat. Bank*, 3 Fed. 185, 1 McCrary 474.

assigned paper, were not applicable.²⁶ A district court of the United States had jurisdiction of a bill in equity praying for the appointment of a receiver of an insolvent corporation, filed by a national bank established within the district within which such court was held.²⁷

Must Be Real Party in Interest.—Under the act now under consideration such jurisdiction could be maintained only when the bank was a real party in interest in the litigation.²⁸

Cross Bill Treated as Original Bill.—Where part of several joint depositors of a fund in a national bank commenced a suit in equity against the bank and the other depositors to have the share of each depositor determined, and the bank filed a cross bill, setting out the facts, and seeking to have all the depositors interplead, and their respective claims adjusted, the bill was treated as an original suit by the bank, so as to give the federal circuit court jurisdiction.²⁹

Venue of Suits against National Banks.—A national bank could not be sued in the federal courts outside of the district where it was located, and service on an officer of the bank when found within another district did not give jurisdiction.³⁰

26. Effect of Judiciary Act of 1789.—Commercial Nat. Bank *v.* Simmons, Fed. Cas. No. 3,062, 1 Flip. 449.

Act of congress, June 3, 1864, § 8, gives national banks power to negotiate and discount promissory notes, and § 57 allows suits by it to be brought in the federal courts where it is located. Held, that such a bank could sue in the federal court where it was located on a note indorsed to it by a citizen of the same state, its rights being governed by such act, and not by Judiciary Act 1789, § 11, limiting the jurisdiction of the circuit court to actions between citizens of different states, and to an action on a note in favor of an assignee only when such action could be brought in such court as if no assignment had been made. Commercial Nat. Bank *v.* Simmons, Fed. Cas. No. 3,062, 1 Flip. 449.

Under Act June 3, 1864, authorizing a national bank to prosecute suits in the United States courts of the district in which it is situate, a national bank may bring an action in the United States courts on a note assigned to it by a resident of the district. Commercial Nat. Bank *v.* Simmons, Fed. Cas. No. 3,062, 1 Flip. 449.

27. Suit by national bank praying receiver for an insolvent corporation.—Fifth Nat. Bank *v.* Pittsburg, etc., R. Co., 1 Fed. 190.

"By section 563 of the Revised Statutes the United States district courts have jurisdiction, inter alia, of all suits

by or against any association established under any law providing for national banking associations within the district within which the court is held." Fifth Nat. Bank *v.* Pittsburg, etc., R. Co., 1 Fed. 190.

28. Bank must be real party in interest.—Foss *v.* First Nat. Bank, 3 Fed. 185, 1 McCrary, 474.

Where several claimants of a fund in the custody of a national bank bring a bill in equity against the bank and another claimant, and the bank exhibits a cross bill, praying that the parties interplead, and adjudicate between them the title to the fund, disclaiming all title itself, the bank is such a party to the suit as to confer jurisdiction on the federal courts. Foss *v.* First Nat. Bank, 3 Fed. 185, 1 McCrary 474.

29. Cross bill seeking interpleader treated as original suit.—Foss *v.* First Nat. Bank, 3 Fed. 185, 1 McCrary 474.

30. Venue of suits against national bank.—Main *v.* Second Nat. Bank, Fed. Cas. No. 8,976, 6 Biss. 26.

Under Judiciary Act 1789, § 11, prohibiting a suit in a federal court by original process against an inhabitant of the United States in any other district than that whereof he is an inhabitant, a national bank is an inhabitant of the state or district where it is located and established, and can not be sued in a federal court for another district. Main *v.* Second Nat. Bank, Fed. Cas. No. 8,976, 6 Biss. 26.

Effect of service on officer in an-

Right to Sue in Courts of Other Districts.—The question then arose as to the right of a national bank to sue in federal courts out of the district in which it was established. It was determined that there was no law authorizing such banks to sue in the courts of other districts regardless of the amount in controversy, etc.³¹ Under the National Bank Act of 1864, a national bank, as such, was not authorized to sue in a federal court outside the district where it was located.³² Where there are two districts in a state, a national bank may bring a suit not of a local nature in the circuit court of the one in which it is located, against two or more defendants, one or more of whom reside in the other district, if one of them reside in the district in which suit is brought.³³ But under 13 Stat. 12, authorizing national banks to sue and be sued in any court as fully as natural persons, a bank located in one state is authorized to sue a citizen in another in a United States court held in the district where the defendant resides; since, for the purpose of determining the jurisdiction of a federal court, a national bank will be regarded as a citizen of the state where it is established or located.³⁴ And it is held that the members of a national bank were presumed to be citizens of the state where the bank was located, so as to entitle the bank, under the Judiciary Act of 1789, to sue a citizen of another state in a federal court held for the latter state.³⁵ Under

other district.—In *Main v. Second Nat. Bank*, Fed. Cas. No. 8,976, 6 Biss. 26, it was held that jurisdiction of an action against a national bank is not obtained by a federal court for a district other than the one in which the bank is located, by service on an officer of the bank while in such district; the Practice Act June 1, 1872 (17 Stat. 197), adopting the forms and practice of the states, not changing the rule.

31. Amount in controversy, etc., material.—Under Rev. St. U. S., § 993, allowing national banks to sue and be sued in any court of law and equity as fully as natural persons, such a bank, attempting to sue in a federal court for a district other than the one in which the bank is established, is subject to the jurisdictional limits as to the amount in controversy in action by natural persons. *St. Louis Nat. Bank v. Brinkman*, 1 Fed. 45, 1 McCrary 9.

Quære, whether a national bank can maintain a suit in a circuit court, other than the district in which such association is established. *First Nat. Bank v. Smith*, 6 Fed. 215.

Whether an action against a national banking association can be brought only in the federal court within the district, or in a state court within the county or city in which it

is located, quære. *McCracken v. Covington City Nat. Bank*, 4 Fed. 602.

32. Suits by national bank as such.—*St. Louis Nat. Bank v. Allen*, 5 Fed. 551, 2 McCrary 92; *Third Nat. Bank v. Harrison*, 8 Fed. 721, 3 McCrary 162.

33. Where two districts in state.—Under Rev. St., § 629, jurisdiction of suits by or against national banks is vested in any circuit, district, or territorial court of the United States held within the district in which such bank is located; and where a state comprises two districts, and the suit is not of a local nature, a circuit court in a district in which the bank is located has jurisdiction of a suit by the bank against two or more defendants, though one or more of them resides in the other district, if one defendant resides in the district where the suit was brought. *Third Nat. Bank v. Harrison*, 8 Fed. 721, 3 McCrary 162.

34. Suits by national banks.—*St. Louis Nat. Bank v. Allen*, 5 Fed. 551, 2 McCrary 92.

35. Presumption as to citizenship.—*Manufacturers' Nat. Bank v. Baack*, Fed. Cas. No. 9,052, 2 Abb. U. S. 232, 2 Blatchf. U. S. 137, 40 How. Prac. 409.

A national bank organized and located in one state may bring an action in the federal court of another

Rev. Stat., §§ 110, 111, which provided that United States circuit courts should have jurisdiction of all suits by or against national banks "established in the district for which the court is held," a federal court had no jurisdiction of an action brought by a national bank established in a district other than that where such court was held when the amount involved did not exceed \$500.³⁶ Under Rev. St., § 563, giving district courts jurisdiction "of all suits by or against any association, established under any law providing for national banking associations, within the district for which the court is held," and Act Cong. Aug. 13, 1888, § 4, making national banking associations, for the purpose of all actions, citizens of the state wherein they are located, "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," district courts have no jurisdiction of an action on a promissory note, brought by a national bank in a district other than that in which the bank is located.³⁷

Actions by and against Receivers.—See post, "Suits by and against Receivers," § 275 (2).

Act of March 3, 1875.—The Act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the state courts, and for other purposes," did not repeal the Act of 1864, giving circuit courts jurisdiction of all suits by or against any banking association in the district for which the court is held.³⁸

§ 275 (1ab) Rule under Act of 1882.—Prior to the Act of July 12, 1882, suits might be brought by or against national banks in the circuit court of the United States in the district where the bank was located.³⁹ By the Act of July 12, 1882, it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law

state against a citizen of the latter state, for it will be presumed that the individual members of such bank are citizens of the state where the bank is located. *Manufacturers' Nat. Bank v. Baack*, Fed. Cas. No. 9,052, 2 Abb. U. S. 232, 2 Blatchf. U. S. 137, 40 How. Prac. 409.

In a suit by a national bank, an allegation that plaintiff is a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state, and that defendant is a citizen of New York, is sufficient to give jurisdiction to the federal court in New York, under Act Sept. 24, 1789, § 11, which gives the federal courts jurisdiction where the suit is between a citizen of the state where the suit is brought and a citizen of another state. *Manufacturers' Nat. Bank v. Baack*, Fed. Cas. No. 9,052, 2 Abb. U. S. 232, 2 Blatchf. U. S. 127, 40 How. Prac. 409.

National banks are deemed to be residents of the state and district in which they are located and established. *Main v. Second Nat. Bank*, Fed. Cas. No. 8,976, 6 Biss. 26; *St. Louis Nat. Bank v. Allen*, 5 Fed. 551, 2 McCrary 92; *Cadle v. Tracy*, Fed. Cas. No. 2,279, 11 Blatchf. 101; *St. Louis Nat. Bank v. Brinkman*, 1 Fed. 45, 1 McCrary 9.

36. Jurisdiction of circuit court.—*St. Louis Nat. Bank v. Brinkman*, 1 Fed. 45, 1 McCrary 9.

37. Action on promissory note.—*Farmers' Nat. Bank v. McElhinney*, 42 Fed. 801.

38. Effect of Act March 3, 1875.—*Third Nat. Bank v. Harrison*, 8 Fed. 721, 3 McCrary 162.

39. Prior to Act of July 12, 1882.—*Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 952.

providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suit may be begun." Under this act nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation but a national bank was placed in the same situation in this respect as a bank not organized under the laws of the United States.⁴⁰ But since that act,⁴¹ the federal courts have jurisdiction only where the record shows the existence of adverse citizenship,⁴² or in cases in which a federal question is in-

40. Under Act of July 12, 1882.—*Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592; *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed. 224, 27 S. Ct. 69; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498; *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; *Leather Mfg'rs. Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816, 7 S. Ct. 777; *Ex parte Jones*, 164 U. S. 691, 41 L. Ed. 601; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Watkins v. American Nat. Bank*, 199 U. S. 599, 50 L. Ed. 327, 26 S. Ct. 746; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37.

"The Act of 1882 provided in clear and unmistakable terms that the courts of the United States should not have jurisdiction of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a state bank doing business in the same state with the national bank. The provision is not that no such suit shall be brought by or against such a national bank in a federal court, but that a federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there, for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank." *Leather*

Mfg'rs. Bank v. Cooper, 120 U. S. 778, 30 L. Ed. 816, 7 S. Ct. 777.

The Act of July, 1882, does not apply to suits brought before its enactment. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37.

Of an action by a stockholder of a national bank against the bank and its officers in a circuit court for a certain district, where all the parties were citizens of the district, and the bank was located therein, the circuit court for that district had no jurisdiction, there being no grounds therefor under §§ 5209, 5239, Rev. Stat. *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592.

41. Act of July 12, 1882.

42. Diverse citizenship necessary.—*Danahy v. National Bank*, 12 C. C. A. 75, 64 Fed. 148; *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592.

Jurisdiction of federal courts on ground of diversity of citizenship.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Leather Mfg'rs. Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816, 7 S. Ct. 777.

"A national bank located in one state may bring suit against a citizen of another state in the circuit court of the United States for the district wherein the defendant resides, by reason alone of diverse citizenship." *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the circuit courts, that was taken away, by the proviso to the 4th section of the Act of congress of July 12, 1882, c. 290, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different states or under the constitution or laws of the United

volved.⁴³ Act July 12, 1882, to enable national banks to extend their corporate existence, placed national and other banks, as to their right to sue in the federal courts, on the same footing, and consequently a national bank can not, in virtue of a mere corporate right, sue in such courts.⁴⁴ The mere fact that a national bank is a federal corporation does not give it the right to remove an action against it to the federal court under the act.⁴⁵ Where a national

States, except in that respect, remained unchanged. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

"No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

A national bank is not authorized to sue in any circuit court of the United States without regard to citizenship. *St. Louis Nat. Bank v. Allen*, 5 Fed. 551, 2 McCrary 92.

An action by a national bank on a note is not maintainable in the federal courts, where the record does not show diverse citizenship. *Danahy v. National Bank*, 12 C. C. A. 75, 64 Fed. 148.

43. Suits arising under laws of United States.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54. See *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. 76.

A suit on the official bond of the cashier of a national bank, conditioned for the faithful performance of the duties thereof "according to law and by-laws" of the bank, involves a federal question, and is maintainable in a federal court, irrespective of the citizenship of the parties. *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 56 Fed. 76.

Action against receiver of national bank.—Thus an action against a receiver of a national bank appointed by the comptroller of the currency is an action against an officer of the United States, and is one arising under the laws of the United States and within the jurisdiction of the federal courts. *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

44. Act of July 12, 1882.—*Union Nat. Bank v. Miller*, 15 Fed. 703; *Leather Mfg'rs. Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816, 7 S. Ct. 777; *Whittemore v. Amoskeag Nat. Bank*,

134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592; *Ex parte Jones*, 164 U. S. 691, 41 L. Ed. 601; *National Bank v. Fore*, 25 Fed. 209; *Wichita Nat. Bank v. Smith*, 72 Fed. 568.

The tenth subdivision of § 629, Rev. St., providing that "the circuit courts shall have original jurisdiction of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations," was repealed by the proviso in § 4 of chapter 290, St. 1881-82, which provides "that the jurisdiction of suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." *National Bank v. Fore*, 25 Fed. 209.

Money placed in the hands of the cashier of an insolvent national bank to indemnify him as surety on an attachment bond is a trust fund, although mingled with the bank's funds, so that it went into the receiver's hands with the general assets; and a state court has jurisdiction to enter a decree establishing it as a preferred claim against the bank. *Flint Road Cart Co. v. Stephens*, 32 Mo. App. 341.

45. Right of removal.—Under Act July 12, 1882, repealing all acts and parts of acts inconsistent therewith, and providing that the jurisdiction of federal courts of all suits in which a national bank is a party shall be the same as if it were a state bank, a national bank had no right to remove a cause from a state to a federal court on the ground alone that it is a federal corporation. *Leather Mfg'rs. Bank v. Cooper*, 120 U. S. 778, 30 L. Ed. 816, 7 S. Ct. 777, affirming 29 Fed. 161.

bank suspends before a draft sent to it for collection is paid, action for recovery can be maintained against its receiver, and state courts are not deprived of jurisdiction thereof by §§ 5234, 5242, Rev. St., U. S.⁴⁶ Under prior statutes, the case conflicted as to whether receivers of national banking associations had not the privilege, as such officers, of being sued only in the federal courts; whether suits against them in state courts could not, on that ground alone, be removed to the federal courts.⁴⁷ And in some cases it was held that a suit by or against a corporation created by an act of congress, is a suit arising under the laws of the United States within the meaning of § 2 of the Removal Act of 1875, and may be removed from a state court.⁴⁸ But where the object of a suit was to control the official conduct of a receiver, appointed under the authority of the national banking laws, and his defense rested on the interpretation of those laws, the case was within the jurisdiction of the federal circuit court, as being one "arising under the * * * laws of the United States,"⁴⁹ and this without regard to the

46. Action to recover on draft after suspension of bank.—*Corn Exch. Bank v. Blye*, 40 Hun 639, 2 N. Y. St. Rep. 112.

47. Holding exclusive or concurrent jurisdiction.—*Bird v. Cockrem*, Fed. Cas. No. 1,429, 2 Woods 32. See *Pettilton v. Noble*, Fed. Cas. No. 11,044, 7 Biss. 449.

A receiver of a national bank has no right, by virtue of his being receiver, to remove from a state to a federal court an action against him for refusing to surrender property alleged to belong to plaintiff. *Bird v. Cockrem*, Fed. Cas. No. 1,429, 2 Woods 32.

The mere fact that one of the parties to a suit is a national bank is no ground for its removal from the state to the federal courts. *Wilder v. Union Nat. Bank*, Fed. Cas. No. 17,651, 9 Biss. 178.

A national banking association against which a suit has been brought in a state court has no right to remove it to a federal court on the ground that the case is one arising under the laws of the United States, in which case a removal is authorized by Act March 3, 1875. *Pettilton v. Noble*, Fed. Cas. No. 11,044, 7 Biss. 449. See *Wilder v. Union Nat. Bank*, Fed. Cas. No. 17,651, 9 Biss. 178.

The foregoing cases are criticised in *Cruikshank v. Fourth Nat. Bank*, 16 Fed. 888.

48. Corporation created by act of congress.—*Cruikshank v. Fourth Nat. Bank*, 16 Fed. 888, citing *Union Pac. R. Co. v. McComb*, 1 Fed. 799, 17 Blatchf. 510, 58 How. Prac. 478, criticising *Pettilton v. Noble*, Fed. Cas. No.

11,044, 7 Biss. 449; *Wilder v. Union Nat. Bank*, Fed. Cas. No. 17,651, 9 Biss. 178.

49. Jurisdiction of federal circuit court—Cases arising under federal law.—*Grant v. Spokane Nat. Bank*, 47 Fed. 673, citing *Armstrong v. Ettletsohn*, 36 Fed. 209; *Armstrong v. Trautman*, 36 Fed. 275; *McConville v. Gilmore*, 36 Fed. 277, 1 L. R. A. 498; *Sowles v. Witters*, 43 Fed. 700; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984, 3 S. Ct. 289; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319, 5 S. Ct. 1113; *Bachrack v. Norton*, 132 U. S. 337, 33 L. Ed. 377, 10 S. Ct. 106; *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892, 11 S. Ct. 283; *Pock v. Perkins*, 139 U. S. 628, 35 L. Ed. 314, 11 S. Ct. 677. See *Cruikshank v. Fourth Nat. Bank*, 16 Fed. 888.

An action to secure the application to plaintiff's claim against an insolvent national bank of funds in the hands of a receiver of the bank, appointed by the comptroller of the currency, is within the jurisdiction of the federal circuit court, as being one "arising under the laws of the United States," since the object of the suit is to control the official conduct of the receiver, appointed under the national banking laws, and his defense must rest on the interpretation of those laws. *Grant v. Spokane Nat. Bank*, 47 Fed. 673.

A suit to compel the receiver of a national bank to pay a certain claim out of the bank assets is removable as being a suit arising under the laws of

citizenship of the parties.⁵⁰ Under this act a national bank can not institute and maintain a suit against residents of its own state and judicial district in United States courts.⁵¹ The circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.⁵² Neither Rev. Stat., § 5209, prescribing for embezzlement or willful misapplication of the funds or credits of a national bank association by its officers or directors, nor § 5239, providing for a suit by the comptroller of the currency to forfeit the franchises of the national bank for the intentional violation by the directors of the law regulating such banks, confers jurisdiction on the circuit court of the United States, of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment of sums lost by reason of their illegal conduct.⁵³

Federal Question Involved.—Where a federal question is involved, such as the construction of federal statutes, treaties, etc., the federal court's jurisdiction does not depend upon the citizenship of the parties.⁵⁴ A suit by a national bank against its directors to recover for loss caused by violation of the National Bank Act, in loaning bank funds in excess of the restriction placed thereon, is within the federal court's jurisdiction.⁵⁵ A federal court has jurisdiction of an action brought by the receivers of an insolvent

the United States within Act of March 3, 1887, and August 13, 1888, defining the jurisdiction of federal courts. *Hot Springs, etc., School Dist. No. 10 v. First Nat. Bank*, 61 Fed. 417.

"In this suit he has interposed a demurrer to the plea of the complainant, and the question now at issue is, what construction shall be placed upon the provisions of the national banking laws with reference to the distribution of the funds of insolvent banks by receivers under the admitted facts of this case? I am clearly of the opinion that this case is one arising under the laws of the United States, and the motion to remand is denied. *Sowles v. Witters*, 43 Fed. 700; *Sowles v. First Nat. Bank*, 46 Fed. 513; *San Diego v. California Nat. Bank*, 52 Fed. 59." *Hot Springs, etc., School Dist. No. 10 v. First Nat. Bank*, 61 Fed. 417.

50. Without regard to citizenship of parties.—A suit, brought against the receiver of an insolvent national bank, as such, to establish a claim of the plaintiff as a depositor in the bank, is a case arising under the laws of the United States, of which the United States circuit court has jurisdiction,

irrespective of the citizenship of the parties. *Bartley v. Hayden*, 74 Fed. 913.

51. Suits against residents of own state.—*National Bank v. Fore*, 25 Fed. 209.

A suit in a federal court against an executor, to recover a legacy, wherein a receiver of a national bank which held assets of the estate is party defendant, will be dismissed, on demurrer, as to the executor, for want of jurisdiction, when all the parties are citizens of the same state. *Wardens, etc., St. Luke's Church v. Sowles*, 51 Fed. 609.

52. Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592.

53. Jurisdiction of circuit court.—*Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592.

54. Federal question involved.—*Linn County Nat. Bank v. Crawford*, 69 Fed. 532.

55. Suit to recover loss caused by violating Bank Act.—*National Bank v. Wade*, 84 Fed. 10.

national bank in the name of the bank, to realize its assets, irrespective of the citizenship of the parties.⁵⁶ And a United States circuit court has jurisdiction of an action by a national bank to enjoin the collection of an excessive tax levied by a county in which it is located; since such suit involves the construction and application of Rev. St., § 5219, giving a state authority to tax national banks, but providing that such taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state; which is a matter involving federal authority.⁵⁷

§ 275 (1ac) Rule under Acts of 1887 and 1888.—The Judiciary Act of March 3, 1887, as corrected by the Act of August 13, 1888, c. 866, provided “that all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same states. The provisions of this section shall not be held to effect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.⁵⁸ Since the passage of the foregoing provision national banks are placed upon precisely the same footing as individuals and other corporations with respect to the right to sue and be sued in the federal courts, except in cases to be hereafter mentioned.⁵⁹ The above statute does not, when one of the parties is a national bank, take away the jurisdiction inhering in federal courts by reason of diverse citizenship,⁶⁰ but is merely intended to preserve

56. Action by receiver to realize assets.—*Linn County Nat. Bank v. Crawford*, 69 Fed. 532.

The F. National Bank pledged to the U. Bank, as collateral, a draft held by it. The F. Bank failed, and the comptroller appointed a receiver, to whom the U. Bank indorsed the draft for collection. Held, that the receiver could show that the draft was really an asset of the F. Bank, on which he could sue in a federal court, by virtue of his appointment, irrespective of the citizenship of parties. *Thompson v. Pool*, 70 Fed. 725.

57. Matter involving construction of federal law.—*Union Nat. Bank v. Miller*, 15 Fed. 703.

58. Acts of 1887 and 1888.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *First Nat. Bank v. Forest*, 40 Fed. 705; *Armstrong v. Troutman*, 36 Fed. 275; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54; *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed. 224, 27 S. Ct. 69; *Kim-*

bell v. Chicago, etc., Brick Co., 194 U. S. 631, 48 L. Ed. 1158, 24 S. Ct. 858; *Warder v. Loomis*, 197 U. S. 619, 49 L. Ed. 909; *Russell v. Russell*, 200 U. S. 613, 50 L. Ed. 620, 26 S. Ct. 755.

Such banks are therefore subject to suit in state courts. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

59. Placed upon footing of individuals, etc.—*Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Ex parte Jones*, 164 U. S. 691, 41 L. Ed. 601, 17 S. Ct. 222; *Danahy v. National Bank*, 12 C. C. A. 75, 64 Fed. 148; *Farmers', etc., Bank v. McElhinney*, 42 Fed. 801; *First Nat. Bank v. Forest*, 40 Fed. 705; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865.

60. Diverse citizenship conferring jurisdiction.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Danahy v. National Bank*, 12 C. C. A. 75, 64 Fed. 148; *First Nat.*

such jurisdiction in cases in which both parties are citizens of the same state and a federal question is involved,⁶¹ or where there are conflicting claims to land under grants of different states.⁶² The federal court has jurisdiction in a suit by a stockholder of a national bank to restrain its officers from misapplying its funds or making a loan to any one borrower to an amount exceeding one-tenth of its capital.⁶³ The question whether a savings bank should be paid in full by an insolvent national bank pursuant to state law or pro rata, as provided by the federal law, is a controversy arising under the laws of the United States, and the federal court has jurisdiction.⁶⁴ Were it not for the state law, the plaintiff would, of course, be paid ratably with the other creditors, in pursuance of the national law. Whether or not the state can legislate in this manner with reference to national banks is a question for the federal courts and not the state courts to decide. To give state courts sole jurisdiction to determine whether state legislation is in conflict with the National Bank Act would tend to throw the national system into confusion.⁶⁵ It has been held that there is no federal question where a rule of common law applicable to the controversy is controlling alike upon the state and United States courts,⁶⁶ but such a decision is not applicable where the construction of a United States statute is involved.⁶⁷

Bank v. Forest, 40 Fed. 705; *Manufacturers' Nat. Bank v. Baack*, Fed. Cas. No. 9,052, 2 Abb. U. S. 232, 8 Blatchf. 137, 40 How. Prac. 409; *St. Louis Nat. Bank v. Allen*, 5 Fed. 551, 2 McCrary 92.

Suits by or against national banks may be brought or removed upon the ground of diverse citizenship. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

Act of Congress, Aug. 13, 1888, § 4, provides that national banks shall, "for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located," and that the circuit and district courts of the United States shall not have in such cases "jurisdiction other than such as they would have in cases between individual citizens of the same state." Held, that the federal courts have jurisdiction of an action between a national bank located in one state and a citizen of another state. *First Nat. Bank v. Forest*, 40 Fed. 705.

Such a suit can not be prevented by state legislation. *Orange Nat. Bank v. Traver*, 7 Fed. 146, 7 Sawy. 210.

61. Where federal question involved.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

62. Conflicting claims to land.—*Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

63. Suit to restrain violation of federal statutes.—Such loan being prohibited by the Act of June 3, 1864, § 29 (13 Stat. 99). *Shoemaker v. National Mechanics' Bank*, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101.

64. Question arising under federal law.—*Auburn Sav. Bank v. Hayes*, 61 Fed. 911.

The question whether an insolvent national bank should pay a savings bank in full (*Laws N. Y. 1882, c. 409, § 282*) or pro rata (*Rev. St., §§ 5236, 5242*) is one to be determined by the United States courts. *Auburn Sav. Bank v. Hayes*, 61 Fed. 911.

65. *Auburn Sav. Bank v. Hayes*, 61 Fed. 911.

66. *Auburn Sav. Bank v. Hayes*, 61 Fed. 911, citing *Tehan v. First Nat. Bank*, 39 Fed. 577.

67. *Auburn Sav. Bank v. Hayes*, 61 Fed. 911.

In *Auburn Sav. Bank v. Hayes*, 61 Fed. 911, in determining whether or not the construction of a United States statute was involved, the court said: "The plaintiff may be right as to the interpretation of this statute, but that its construction is involved there can be no doubt. Whatever defense the defendant has depends upon the section referred to. The question presented by this motion is not what the construction of these sections should be, but whether the state courts or the United States courts should con-

Proviso to Act of 1888.—The provision of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officers thereof, or cases for winding up the affairs of any such bank.⁶⁸ The federal courts have jurisdiction of cases for the winding up of the affairs of a national bank without regard to the question of citizenship, and a suit for the appointment of a receiver is such a suit.⁶⁹ Under this clause, an action under § 2 of the Act of June 30, 1876, to enforce individual liability of shareholders in a national bank which has gone into voluntary liquidation in the manner provided in § 5220 of the Revised Statutes,⁷⁰ or an action on a contract for rent alleged to be due under the terms of a lease to a national bank, brought by the agent of the shareholders of the bank to whom the comptroller of the currency has released its assets,⁷¹ is cognizable in the federal courts. And a suit against a bank and others charging a conspiracy to defraud, and seeking the recovery of moneys alleged to have been obtained thereby, where a receiver subsequently appointed by the comptroller intervenes, falls within the same category.⁷²

Suits for Forfeiture of Charter.—The United States courts have exclusive jurisdiction to declare a forfeiture of the charter of a national bank as the result of wrongs committed by the directors.⁷³

As to suits by and against receivers and agents, and as to their capacity as officers of the United States, see post, "Suits by and against Receivers," § 275 (2); "Suits by and against Agents," § 275 (3).

§ 275 (1b) Jurisdiction of State Courts.—Jurisdiction of State Courts under Earlier Statutes.—Under the Act of June 3, 1864, it is provided that "suits, actions and proceedings against any association under this act may be had in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases, provided, however, that all proceedings to enjoin the comptroller under this

strue them. I am of the opinion that this power belongs to the United State courts. *Sowles v. Witters*, 43 Fed. 700; *Grant v. Spokane Nat. Bank*, 47 Fed. 673; *Walker v. Richards*, 55 Fed. 129."

68. Proviso to Act of 1888.—See Act of August 13, 1888, ch. 866, § 4.

The federal jurisdiction of actions on suits for winding up the affairs of national banks is saved by the Act of March 13, 1887. *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54; *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed. 224, 27 S. Ct. 69; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

69. Suit to wind up affairs of bank.—*Lake Nat. Bank v. Wolfborough Sav.*

Bank, 78 Fed. 517.

70. Action to enforce liability of stockholders.—*Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

71. Action for money due bank on lease.—*International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. Ed. 224, 27 S. Ct. 69; citing *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

72. Suit charging conspiracy to defraud—Intervention of receiver.—*Speckart v. German Nat. Bank*, 85 Fed. 12.

73. Suit for forfeiture of charter.—*Yates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638.

act shall be had in circuit, district or territorial court of the United States, held in the district in which the association is located."⁷⁴ Under the act in question the federal and state courts have concurrent jurisdiction in all cases except those excepted by the act.⁷⁵ Such courts have concurrent jurisdiction of an action to recover a penalty for a violation of the act,⁷⁶ thereby modifying the Act of 1789, § 9, which gave the federal district courts exclusive jurisdiction of all suits for penalties and forfeiture under the laws of the United States.⁷⁷ A suit against a national bank to obtain

74. Jurisdiction of state courts under Act of 1864.—*Cadle v. Tracy*, Fed. Cas. No. 2,279, 11 Blatchf. 101.

National banks, like any other corporations, and the receivers of the same, may sue and be sued in the state courts of their domicile. *Adams v. Daunis*, 29 La. Ann. 315.

State courts have jurisdiction of actions brought by national banks. *First Nat. Bank v. Hubbard*, 49 Vt. 1, 24 Am. Rep. 97.

75. Concurrent jurisdiction.—*Bank v. Lucas* (Pa.), 1 Leg. Chron. 321.

"The law as it stood previous to the Act of July 12, 1882, 22 Stat. 163, c. 290, § 4, gave the proper state federal courts concurrent jurisdiction in all ordinary suits against national banks." *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

There is nowhere in the banking act any evidence of an intention on the part of congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52.

A national banking association may be sued in any state, county, or municipal court in the county or city where such association is located, having jurisdiction in similar cases. *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840.

In the case of *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840, it was decided that suit might be brought in a state court against a national bank, although it had made default in paying its circulating notes, and a receiver of a bank had been appointed by the comptroller of the currency. *Calhoun v. Lanaux*, 127 U. S. 634, 32 L. Ed. 297, 8 S. Ct. 1345.

Rev. St., § 629, subd. 10, giving the federal circuit courts jurisdiction of all suits by or against any banking association, established in the district where such court is held, does not give such court exclusive jurisdiction of such cases, but concurrent with that

of the state courts. *Pettilon v. Noble*, Fed. Cas. No. 11,044, 7 Biss. 449.

Rev. St., § 5198, as amended by Act Feb. 18, 1875, which provides that actions against national banks may be had in the federal court held within the district in which the bank is established does not confer exclusive jurisdiction upon the federal courts. *New Orleans Nat. Banking Ass'n v. Adams*, Fed. Cas. No. 10,184, 3 Woods 21.

Under this section the state courts have concurrent jurisdiction with the federal courts of all actions by and against national banks. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37; *Adams v. Daunis*, 29 La. Ann. 315.

A stockholder in a national bank, who has been compelled to contribute to its debts, may maintain an action against the directors, charged by him to have caused the loss by their negligence and misconduct, the bank and its receiver having refused to bring suit, and the comptroller of the currency having refused to sanction it; and such action may be brought in a state court. *Nelson v. Burrows* (N. Y.), 9 Abb. N. C. 280.

76. Suit to recover penalty.—Under Act Cong. June 3, 1864, relating to national banks, and by § 57, providing that actions under the act may be had in any circuit, district, or territorial district court of the United States, or in any state court in which the association is located, the state and federal courts have concurrent jurisdiction of an action against a bank for a penalty for violation of said act. *Bank v. Lucas* (Pa.), 1 Leg. Chron. 321.

77. Modification of the Act 1789 as to penalties and forfeitures.—Act Cong. 1789, § 9 (Rev. St., §§ 563, 711), gave the United States district courts exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. The National Banking Act of June 3, 1864, as amended February 18, 1875 (Rev. St., §§ 5197, 5198), authorized national

the cancellation of a mortgage held by it is properly brought in the state court.⁷⁸

Permissive or Mandatory Character of Act.—Some of the cases hold that the act is not merely permissive, giving to the courts named jurisdiction in common with other state courts, but it excludes the jurisdiction of all state courts except those of the county or city in which the bank is located.⁷⁹ Thus, under that act a state court has no jurisdiction of an action against a national bank located in another state.⁸⁰ There is a line of cases which hold that the provision was permissive and not mandatory.⁸¹ But

banks to sue and be sued in any court as fully as natural persons, and provided that suits against them might be brought "in the United States courts in the district, or "in any state, county, or municipal court in the county or city, in which said association is located, having jurisdiction in similar cases." Held, that the latter act modified the former in respect to jurisdiction of actions against national banks for penalties, and gave concurrent jurisdiction to the state courts. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37.

Where a national bank loans money at a usurious rate of interest, taking the note of the borrower therefor, and afterwards another note is given in renewal, bearing only the legal rate, and having indorsed thereon the payment of all interest in excess of that rate, the latter, notwithstanding the said indorsement, is affected with usury, and that fact may be set up as a defense in a state court. *National Bank v. Eyre*, 52 Iowa 114, 2 N. W. 995, distinguishing *Higley v. First Nat. Bank*, 26 O. St. 75, 20 Am. Rep. 759.

Usury.—As to jurisdiction of state courts with regard to usury, see ante, "Action for Penalty or to Recover Usury Paid," § 270 (11).

78. Suit to cancel mortgage.—Under Rev. St., § 5198, providing that suits against any association under that title could be brought in any federal court or in a state court, a suit against a national bank to obtain the cancellation of a mortgage held by it is properly brought in a state court. *New Orleans Nat. Banking Ass'n v. Adams*, Fed. Cas. No. 10,184, 3 Woods 21.

79. Act not merely permissive.—Other state courts excluded.—*Crocker v. Marine Nat. Bank*, 101 Mass. 240, 3 Am. Rep. 336.

In what courts jurisdictions vested.—A national bank incorporated under Act June 3, 1864, can be sued only in

the courts designated in § 57. *Cadle v. Tracy*, Fed. Cas. No. 2,279, 11 Blatchf. 101; *Garner v. Second Nat. Bank*, 66 Fed. 369; *First Nat. Bank v. La Due*, 39 Minn. 415, 40 N. W. 367; *Safford v. First Nat. Bank*, 61 Vt. 373, 17 Atl. 748. The courts in some cases have asserted jurisdiction by service of an attachment on the property of the bank in another state.

Act June 3, 1866, § 57, provides that suits and proceedings against any national bank created under that act may be had in any circuit, district, or territorial court of the United States held in a district where the bank was established, or in any state, county, or municipal court in the city or county in which said bank is located. Held, that the jurisdiction of the courts named was exclusive, and that a state court of a state other than that in which the bank was located could acquire no jurisdiction of a suit brought against the bank by attachment of its assets located in that state. *Cadle v. Tracy*, Fed. Cas. No. 2,279, 11 Blatchf. 101.

80. Bank located in another state.—*Cadle v. Tracy*, Fed. Cas. No. 2,279, 11 Blatchf. 101.

81. By Rev. St. U. S., § 5198, providing that a national bank may be sued in any state or county court in the county in which it is located having jurisdiction of similar cases, and § 5136, providing that such bank may be sued in any court of law and equity as a natural person, jurisdiction of an action on contract against a national bank is not prohibited to a state court of a county other than that in which it is situated. *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491; 24 Pac. 157.

The provision of The National Currency Act, so called (13 Stat., p. 99, § 57), which declares "that suits, actions or proceedings against any associations under the act may be had" in the federal courts held in the districts or in any state, county, or mu-

the provisions of the act authorizing national banks to be sued only in the state courts in the counties or cities where located, confers a privilege on such banks which they can waive.⁸²

Actions Local in Nature.—Actions, local in their nature, may be maintained in the proper state court against a national banking association in a county or a city other than that where it is established.⁸³

Power to Deprive State Courts of Jurisdiction.—It has been questioned whether or not it is within the powers of congress to deprive the state courts of jurisdiction in all actions against banking associations organized under the National Currency Act, or to restrict the jurisdiction to particular courts.⁸⁴ It is true that it was held that every action which the Bank of the United States might bring was a case arising under the constitution and laws of the Union.⁸⁵ But it is maintained that the United States Bank was chartered as a fiscal agent of the government while national banks are created under a supposed power to furnish a national paper currency, and that the distinction is in favor of the jurisdiction of the state courts and against the restriction.⁸⁶

Under the Act of 1882, the jurisdiction of suits by or against national

municipal court in the city or county where the association is located, is permissive, not mandatory. *Cooke v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667. See *First Nat. Bank v. Hubbard*, 49 Vt. 1, 24 Am. Rep. 97.

A national bank created under the Act of Congress of June 3, 1864, may be sued in a state court out of the state in which such bank is located. *Cooke v. State Nat. Bank*, 3 Abb. Prac., N. S., 339, 50 Barb. 339, affirmed in 52 N. Y. 96.

Suit is not confined to the county where the bank is located. *Talmadge v. Third Nat. Bank*, 27 Hun 61.

Rev. St. U. S., § 5798, authorizing suits in state courts against national banks situated in the state, is permissive, and not mandatory. The supreme court of New York has jurisdiction over an action *ex contractu*, brought by a citizen of New York against a national bank located in another state. *Robinson v. National Bank*, 81 N. Y. 385, 59 How. Prac. 218, 37 Am. Rep. 508, affirming 58 How. Prac. 306, 19 Hun 477.

A suit against a national bank for a breach of contract may be brought in a state court of a state other than that in which the bank is located. *Holmes v. National Bank*, 18 S. C. 31, 44 Am. Rep. 558.

13 Stat. 99, enacts that every national banking association organized under the act shall be a body corporate, with power, among other things, to sue and

be sued. Section 57 (Rev. St., § 5198) enacts that actions against such associations under the act may be brought in any federal court, or any state, county, or municipal court of the district or place where the bank is located. Held, that a state court was not deprived of jurisdiction of an action for breach of contract against a national bank located in another state. *Holmes v. National Bank*, 18 S. C. 31, 44 Am. Rep. 558.

82. Right to waive privilege.—*Lee v. Citizens' Bank*, 5 O. Dec. 21.

The exemption of national banks from suits in state courts elsewhere than in the county or city where the bank is located, which is granted by the latter act, may be waived, and a bank which submits to trial in another county can not, on writ of error to the state supreme court, raise the objection to the jurisdiction and claim the immunity. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37.

83. Actions local in nature.—*Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52.

84. Power to deprive state courts of jurisdiction.—*Cook v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

85. Osborn v. Bank (U. S.)., 9 Wheat. 738, 6 L. Ed. 204, reviewed and doubted in *Cook v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

86. United States bank and national banks distinguished.—*Cook v. State Nat. Bank*, 52 N. Y. 96, 11 Am. Rep. 667.

banks, where the United States is not a party, by its officers or agents, is declared to be the same as that of similar suits by or against other banks.⁸⁷ So the domicile of the parties may be such as to give the federal courts jurisdiction as in other cases.⁸⁸ Since any nonresident person, national or artificial, who brings attachment in a local court, may be sued in that court on his attachment bond, a national bank can not claim any exception.⁸⁹ The act in question refers to and designates the jurisdiction only of suits brought after its passage and does not affect prior ones.⁹⁰

The Act of 1888, before referred to,⁹¹ provides that in actions against national banks the federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."⁹² An action to compel the directors of a national bank to declare a dividend may be maintained in a state court.⁹³ And state courts have jurisdiction to compel officers of a national bank to permit a stockholder's examination of its records and documents for a proper purpose.⁹⁴

Jurisdiction in Action by and against Receivers.—See post, "Suits by and against Receivers," § 275 (2).

Change of Place of Trial.—While the National Banking Act provides for the place of commencement of actions by and against national banks yet it makes no provision for a change of the place of trial from one state court to another. And it has been contended that state statutes providing for such change have no application to such actions. But it has been held that it was the design of congress to confer jurisdiction upon proper state courts, and leave such courts, after the action is commenced, to be governed solely by the state statutes, so far as their mode of proceeding is concerned, including even a change of place of trial.⁹⁵

87. Under Act of 1882.—*Continental Nat. Bank v. Folsom*, 78 Ga. 449, 3 S. E. 269; *Van Reed v. Peoples' Nat. Bank*, 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, affirmed in 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775. See, also, post, "Attachment and Garnishment," § 278.

88. Domicile as affecting jurisdiction.—Acts 1882, c. 290, relating to the jurisdiction of suits brought by and against national banks, leaves such suits "except suits between them and the United States, or its officers and agents," to the jurisdiction of the state courts, unless the domicile of the parties is such as to give the federal court jurisdiction. *Price v. Abbott*, 17 Fed. 506.

89. Nonresident bringing attachment in local court.—*Continental Nat. Bank v. Folsom*, 78 Ga. 449, 3 S. E. 269.

90. Refers to subsequent suits.—Act Cong. July 12, 1882, entitled "An act to enable national banking associations to extend their corporate ex-

istence, and for other purposes," which makes, in section 4, certain provisions as to the jurisdiction of suits by and against national banks, refers only to suits brought after its passage, and does not affect prior ones. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, 10 S. Ct. 37.

91. Act of 1888.—See ante, "Jurisdiction of Federal Courts," § 271 (1a).

92. *Hiscock v. Lacy*, 9 Misc. Rep. 578, 30 N. Y. S. 860, 62 N. Y. St. Rep. 228.

93. Suit to compel declaration of dividend.—*Hiscock v. Lacy*, 9 Misc. Rep. 578, 30 N. Y. S. 860, 62 N. Y. St. Rep. 228.

94. Action to permit stockholder's examination of records, etc.—*Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581.

95. Change of place of trial.—*Kinsler v. Farmers' Nat. Bank*, 58 Iowa 728, 13 N. W. 59.

In the absence of any provision as to change of place of trial in the Na-

§ 275 (2) Suits by and against Receivers.—An Action by Officer of Government.—Receivers of national banks appointed by the comptroller of the currency under the National Banking Act, are officers of the United States, giving federal courts jurisdiction of actions by officers of the United States,⁹⁶ and they may sue in such courts without regard to the citizenship of the parties or the amount involved,⁹⁷ under the law which confers on such courts jurisdiction “of all suits at common law where the United States, or any officer thereof, suing under authority of any acts of congress, are plaintiffs.”⁹⁸ A receiver may sue in the federal courts to collect a claim due to the bank at the time of his appointment;⁹⁹ and under the provision of the National Banking Act allowing a receiver of a national bank to compromise doubtful claims on order of a court of record of competent jurisdiction, the federal district court has jurisdiction of a petition by such receiver.¹ The jurisdiction of the federal courts over receivers of national banks as officers of the United States has not been affected by later acts of Congress.²

tional Banking Act, authorizing suits against national banks in the state courts, the rights of the parties in that respect are to be governed by the state laws. *Kinser v. Farmers' Nat. Bank*, 58 Iowa 728, 13 N. W. 59.

96. Receivers of banks—Suits by receivers.—*Platt v. Beach*, Fed. Cas. No. 11,215, 2 Ben. 303; *Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357; *Price v. Abbot*, 17 Fed. 506.

Const. U. S. art. 2, § 2, subd. 2, allows congress to vest the appointment of inferior officers of the United States in the heads of departments. Section 31 of The National Banking Act (13 Stat., c. 10) authorizes the comptroller of the currency, with the concurrence of the secretary of the treasury, to appoint a receiver to wind up the affairs of a national bank as provided by the act. Held, that such receiver was an officer of the United States within the meaning of the Act March 3, 1815, conferring on federal courts jurisdiction of all suits brought by any such officer under authority of any act of congress, so that such receiver could sue in the federal district court to recover a debt due the bank. *Platt v. Beach*, Fed. Cas. No. 11,215, 2 Ben. 303.

A receiver of a national bank is an officer of the United States, and as such may sue in the federal courts in the district in which such bank is located. *Frelinghuysen v. Baldwin*, 12 Fed. 395.

A receiver of a national bank, appointed by the comptroller of the currency, is an officer of the United States, and entitled to sue in the federal courts, by virtue of Rev. St., § 629. *Thompson v. Pool*, 70 Fed. 725.

97. Without regard to citizenship

or amount.—*Armstrong v. Ettlesohn*, 36 Fed. 209.

The federal courts have jurisdiction of suits by receivers of national banks, to collect the assets thereof, without regard to the citizenship of plaintiff. *Fisher v. Yoder*, 53 Fed. 565.

A receiver of a national bank may sue in the circuit court to recover an indebtedness owing to the bank, without regard to the amount involved. *Yardley v. Dickson*, 47 Fed. 835.

98. Suits at common law by United States or officers.—*Armstrong v. Ettlesohn*, 36 Fed. 209, Rev. Stat., § 629, cl. 3.

99. Claim due at time of appointment.—*Platt v. Beach*, Fed. Cas. No. 11,215, 2 Ben. 303; *Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357.

Act Cong. March 3, 1887, § 4, declares that national banks are, for the purpose of actions, to be deemed citizens of the states in which they are respectively located, but “the provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.” Held, that a receiver of a national bank may still sue on a claim due the bank in the circuit court, without reference to the citizenship of the parties or to the amount involved. *Armstrong v. Trautman*, 36 Fed. 275.

1. Provision allowing receiver to compromise claims.—In re *Platt*, Fed. Cas. No. 11,211, 1 Ben. 534.

2. Act of Congress July 12, 1882.—By that act it was provided that “the jurisdiction of suits hereafter brought

The Act of 1882 was intended to put national banks as such in the same situation as state banks for the purposes of suing and being sued. The act did not affect suits by and against receivers because such banks were wholly in the hands of the receiver for the purpose of having their affairs wound up, and were not doing business anywhere, such conditions being brought about by proceedings under the laws of the United States and such receiver being an officer of the United States and acting as such in suing or being sued.³ Rev. St., § 563, subd. 4, gives the district courts jurisdiction of "all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." The district court has jurisdiction of an action to enforce the liability of a stockholder in an insolvent national bank, brought by the receiver appointed for the bank by the comptroller of the currency.⁴ Such jurisdiction is not taken away by Act Cong. July 12, 1882, § 4, and Act Cong. Aug. 13, 1888, § 4, which takes away the special jurisdiction of the district courts over suits in which a national bank is a party.⁵

Exclusive or Concurrent Jurisdiction—Suits by Receivers of National Bank.—Though a receiver of a national bank may sue in the federal

by or against any association established under any law providing for a national banking association" should "be the same as and not other than the jurisdiction of suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun."

3. Proceedings under United States laws—Proceedings against United States officer.—*Hendee v. Connecticut*, etc., R. Co., 26 Fed. 677, citing *Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 18 Ben. 357; *Price v. Abbott*, 17 Fed. 506.

Plaintiff was appointed receiver of an insolvent national bank in Vermont, and obtained an order from the circuit court for the district of Vermont for the sale of certain bonds pledged to the bank as security for a debt due the bank by defendant railroad company in Canada, which brought suit in the Canadian court to recover the bonds, whereupon plaintiff filed a bill in the circuit court for the district of Vermont for an injunction against the further prosecution of the suit in Canada. Held, that the circuit court had jurisdiction, and that the injunction should be granted. *Hendee v. Connecticut*, etc., R. Co., 26 Fed. 677.

4. Jurisdiction of district court under Rev. Stat., § 563, Subd. 4.—*Stephens v. Bernays*, 41 Fed. 401, affirmed in 44 Fed. 642.

Rev. St., § 563, gives the district courts jurisdiction of "all suits at common law, brought by the United States, or any officer thereof authorized by law to sue." Act Cong. Aug. 13, 1888 (25 Stat. 433), confers the same jurisdiction on the district courts, and declares (§ 4) that for jurisdictional purposes national banks shall be deemed citizens of the state in which they are located, but that this provision shall not affect the jurisdiction of the federal courts "in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank." Held, that the district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. *Stephens v. Bernays*, 44 Fed. 642, affirming 41 Fed. 401.

An action by a receiver of a national bank to enforce the liability of a stockholder is a "suit at common law," within the meaning of Rev. St. U. S., § 563, subd. 4, which gives the federal district court jurisdiction of "all suits at common law brought by the United States or by any officers thereof authorized to sue." *Stephens v. Bernays*, 119 Mo. 143, 24 S. W. 46, following 41 Fed. 401.

5. Effect of Act July 12, 1882, § 4 and Act Aug. 13, 1888, § 4.—*Stephens v. Bernays*, 41 Fed. 401, affirmed in 44 Fed. 642.

circuit courts, under Rev. St., U. S. § 629, cl. 3, giving such courts jurisdiction of all suits at common law, when the United States, or any officer thereof, serving under authority of any act of congress, is a party, yet he may also sue in the state courts, since Rev. St., U. S. § 711, specifying the cases in which federal courts shall have exclusive jurisdiction, does not mention such cases, and since 24 Stat. U. S., c. 373, § 1, gives the federal circuit courts original cognizance, "concurrent with the courts of the several states," of all suits of a civil nature where the matter exceeds \$2,000, and arising under the constitution and laws of the United States.⁶ Where no proceeding is pending under the national bank law for forfeiture of the charter of a bank, its receiver may, in a state court, maintain an action against its directors to recover damages sustained through their gross neglect of their duties, allowing its funds to be lost or wasted.⁷ In such cases the state courts have concurrent jurisdiction, exclusive jurisdiction not having been conferred upon the federal courts.⁸ The jurisdiction of the state courts of actions against national banks is expressly recognized by the national banking law and such jurisdiction has been repeatedly exercised in actions by receivers to collect claims due to such banks.⁹ And there can be no reason why civil actions brought by stockholders in place of the receiver, to enforce claims against delinquent directors or officers, should stand upon any different footing.¹⁰ The only case in which exclusive jurisdiction, is conferred by the banking act upon the courts of the United States, so far as we can find, are proceedings to enforce the forfeiture of franchises of banking associations for violations of certain provisions of such act,¹¹ and proceedings to enjoin the comptroller of the currency from winding up the corporation through a receiver.¹² A suit by the receiver of an insolvent national bank to foreclose a mortgage given to it is not within any of the classes of cases in which the federal courts have exclusive jurisdiction, and may therefore be instituted in any court having jurisdiction in other respects.¹³ Hence we see that there is nothing in the law which withdraws from the jurisdiction of state courts civil actions to enforce rights of individuals against national banks or their officers.¹⁴ However, criminal

6. **Suits by receiver of national bank.**—*Thompson v. Schaetzel*, 2 S. Dak. 395, 50 N. W. 631.

7. **Proceedings other than to forfeit charter.**—*Brinkerhoff v. Bostwick*, 88 N. Y. 52.

8. *Brinkerhoff v. Bostwick*, 88 N. Y. 52, citing *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Robinson v. National Bank*, 81 N. Y. 385, 59 How. Prac. 218, 37 Am. Rep. 508; *National Bank v. Wells*, 79 N. Y. 498.

9. *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

10. **Suit by stockholders against delinquent directors or officers.**—*Brinkerhoff v. Bostwick*, 88 N. Y. 52.

11. **For violation of § 5239.**—*Brinkerhoff v. Bostwick*, 88 N. Y. 52.

12. **Injunction against comptroller of currency.**—*Brinkerhoff v. Bostwick*, 88 N. Y. 52.

13. **Suit by receiver to foreclose mortgage.**—*Witters v. Sowles*, 61 Vt. 366, 18 Atl. 191.

14. **Jurisdiction not withdrawn from state courts.**—*Brinkerhoff v. Bostwick*, 88 N. Y. 52, citing *Cooke v. State Nat.*

prosecutions for offenses created by the act stand upon a different footing. Exclusive jurisdiction in such cases is vested in the circuit and district courts of the United States under the Judiciary Act of 1789.¹⁵

Right of Receiver to Remove Suit to Federal Court.—See ante, "Jurisdiction of Federal Courts," § 275 (1); catchline "Act of July 12, 1882."

Concurrent Jurisdiction of Circuit and District Courts.—Actions brought by receivers to recover assessments duly laid upon stockholders, and necessary to provide for the payment of the debts, are suits at common law, brought by an officer of the United States, under the authority of an act of congress, of which the circuit court has concurrent jurisdiction with the district court, without regard to the amount sued for.¹⁶

§ 275 (3) Suits by and against Agents.—The federal courts have the same jurisdiction of suits by and against the "agent" of national banks appointed under the national banking acts of congress, when the "receivers" of an insolvent bank have been displaced by such "agents" as they have of suits by and against the "receivers," each being in the same sense officers of the United States, and each representing in precisely the same relation the bank in its corporate capacity; and this without regard to citizenship of the parties or amount involved.¹⁷

§ 276. — Parties.—A circuit court has jurisdiction, upon a bill by a stockholder of a national bank, to enjoin the officers of the bank from misapplying its funds by means not warranted by the charter, or which amount to a breach of trust.^{17a}

Bank, 52 N. Y. 96, 11 Am. Rep. 667; *Bletz v. Columbia Nat. Bank*, 87 Pa. 87, 30 Am. Rep. 343. See post, this section, "Suits against Receivers of National Banks."

15. Rule does not apply in criminal cases.—*Brinkerhoff v. Bostwick*, 88 N. Y. 52.

16. Suits to recover assessments.—*Price v. Abbott*, 17 Fed. 506. See Rev. Stat., § 629, cl. 3; § 563, cl. 4.

17. Suits by and against agents.—*McConville v. Gilmour*, 36 Fed. 277, 1 L. R. A. 498.

"It having been established, especially by the judgment of this court in the case of *Armstrong v. Trautman*, 36 Fed. 275, that we have jurisdiction of cases brought by the receiver of a national bank, without regard to diversity of citizenship or the amount involved, I do not see why we have not the same jurisdiction of suits brought by the 'agent,' appointed under the provisions of The National Banking Act to take the place of the receiver under certain circumstances named in the act. Act June 30, 1876,

c. 156 (1 Supp. Rev. Stat. 216; 19 Stat. 63); *Armstrong v. Trautman*, 36 Fed. 275; *Armstrong v. Ettlesohn*, 36 Fed. 209; *Price v. Abbott*, 17 Fed. 506; *Frelinghuysen v. Baldwin*, 12 Fed. 395." *McConville v. Gilmour*, 36 Fed. 277, 1 L. R. A. 498.

"Moreover, the United States has no more interest in the matter before than after the appointment of this 'agent.' The legislation contemplates a more independent and exclusive control by the United States of the assets before than after this 'agent' is appointed, in the interest of creditors and depositors, no doubt, and for obvious reasons. It also contemplates a somewhat exclusive control by the shareholders of the remnants of the insolvent assets, also for obvious reasons. Nevertheless, the interest of the United States in the matter is precisely the same, and, in both situations of the assets, is based solely on grounds of public policy equally applicable to either." *McConville v. Gilmour*, 36 Fed. 277, 1 L. R. A. 498.

17a. Parties.—*Shoemaker v. Na-*

§ 277. — **Process and Appearance.**—See ante, "Process and Appearance," § 223.

§ 278. — **Attachment and Garnishment.—Power of Federal Court to Issue Attachment.**—Under Rev. St., § 5242, providing that no attachment before final judgment shall be issued in any state court against a national bank, and Rev. St., § 915, entitling plaintiff in the federal courts to similar remedies by attachment as those provided by the laws of the state, a federal court is limited by all the restrictions on state courts, and can not issue an attachment before final judgment against a national bank.¹⁸

Power of State Court to Issue Attachment.—Prior to the Act of March 3, 1873, § 2, the property of a national bank was subject to attachment issued by a state court.¹⁹ And where the property of a national bank organized under Act Cong., June 3, 1864, has been attached at the suit of an individual creditor after the bank became insolvent, such property can not be subjected to sale for the payment of his demand against the claim of the property by a receiver of a bank subsequently appointed.²⁰ The attachment of the property of a national bank in an action against it will not be dissolved, dismissed, or abated, or the levy quashed, because the bank had committed an act of insolvency before the institution of the suit, and its charter had afterwards been dissolved and its franchises forfeited by decree of the federal court, and a receiver properly appointed to take charge of its assets under act of congress.²¹

tional Mech. Bank, Fed. Cas. No. 12,801, 2 Abb. U. S. 416, 1 Hughes 101.

As to parties in attachment, see post, "Attachment and Garnishment," § 278.

18. Power of federal court to issue attachment.—Butler v. Coleman, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; Pacific Nat. Bank v. Mixer, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

Attachments in suits begun in the federal circuit courts are prohibited by implication. "The prohibition does not in express terms refer to attachment in suits begun in the circuit courts of the United States, but, as by § 915, Rev. Stats., those courts are not authorized to issue attachments in common law causes against the property of a defendant, except as 'provided by the laws of the state in which such court is held for the courts thereof,' it follows that, as by the amendatory Act of 1873, now part of § 5242, Rev. Stat., all power of issuing attachments against national banks before judgment has been eliminated from state statutes, there can not be any laws of the state providing for such a remedy on which the circuit courts may act." Pacific Nat. Bank v. Mixer, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

19. First Nat. Bank v. Colby (U. S.), 21 Wall. 609, 22 L. Ed. 687; Pacific Nat. Bank v. Mixer, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; United States v. Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257.

By the Act of 1818, the United States were empowered to enforce payment of the judgment they might obtain against the bank, in specie, by summoning the debtors of the corporation as garnishees, and obtaining judgments against them. This act operated a transfer from the bank to the United States of those debts which might be due from the persons who should be summoned as garnishees. They became, by the service of the summons, the debtors of the United States, and ceased to be the debtors of the bank. But they owed to the United States precisely what they owed to the bank, and no more. United States v. Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257.

20. Sale of attached property by receiver.—First Nat. Bank v. Colby (U. S.), 21 Wall. 609, 22 L. Ed. 687.

21. Dissolution, etc., of attachment.—First Nat. Bank v. Colby, 46 Ala. 435.

Under Act of 1873, Rev. Stat., § 5242.—The Act of March 3, 1873, § 2, amending the Act of June 3, 1864, § 57, provides that no attachment shall be issued against any banking association or its property before final judgment.²² Since the Act of 1873 all the attachment laws of the state must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.²³ The wording of this statute is plain and mandatory.²⁴ This provision was not repealed by Act Cong. July 12, 1882, § 4, providing that the jurisdiction for suits thereafter brought against national banks shall be the same as for suits against state banks, and repealing laws inconsistent therewith.²⁵ Such attach-

22. Act of 1873, Rev. Stat. 5242.—*Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601. See *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865; *Planters*, etc., *Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *First Nat. Bank v. La Due*, 39 Minn. 415, 40 N. W. 367; *Safford v. First Nat. Bank*, 61 Vt. 373, 17 Atl. 748; *Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn.)*, 46 S. W. 1026; *Garner v. Second Nat. Bank*, 66 Fed. 369.

Under Rev. St. U. S., § 5242 (U. S. Comp. St. 1901, p. 3517), attachment can not issue against a national bank in a state, county, or municipal court prior to judgment. *McBride v. Illinois Nat. Bank*, 128 App. Div. 503, 112 N. Y. S. 794.

An attachment can not be issued against a national bank or its property, before final judgment in any suit, action, or proceeding in any state, county, or municipal court. *Central Nat. Bank v. Richland Nat. Bank (N. Y.)*, 52 How. Prac. 136; *Thomp. Nat. Bank Cas.* 801; *Rhoner v. First Nat. Bank (N. Y.)*, 14 Hun 126.

In a suit begun in a state court against a national bank, no attachment can issue until after final judgment. *Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn.)*, 46 S. W. 1026.

23. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

"Section 5242 of the Revised Statutes of the United States contains this provision: 'No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court. The original National Bank Act contained nothing of this kind, but the prohibition first appeared in the act of March 3, 1873, 17 Stat. 603, c. 269, § 2, 13 Stat. 116, c. 106, as a

new proviso added to § 57 of the act of June 3, 1864.'" *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

This language is too plain for discussion as to its meaning, and since the rendition of the decision in *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718, it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. And this rule is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks. There is nothing in the case of *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146, 20 S. Ct. 915, which qualifies the decision announced in the *Mixter* case. *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

24. Wording plain and mandatory.

—The amendment of March 3, 1873 (Rev. St. U. S., § 5242), to § 57 of The National Banking Act of June 3, 1864, providing that no attachment shall be issued against a national bank or its property before final judgment in any suit, action, etc., is mandatory, and applies to attachments issuing from state courts against such banks. *Dennis v. First Nat. Bank*, 127 Cal. 453, 59 Pac. 777, 78 Am. St. Rep. 79.

25. Effect of Act of July 12, 1882, § 4.—*Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865.

Rev. St. U. S., § 5242, was not repealed by implication by Act of Congress July 12, 1882 (22 Stat. 102), relating to the extension of succession of national banking associations, and declaring that they shall continue as

ments are illegal and void.²⁶ And it follows that a bond to dissolve an attachment thus wrongfully issued is void and will not support a judgment or a transfer of securities by the bank to indemnify the sureties.²⁷ An in-

the same association, provided that jurisdiction for suits by or against them, except between them and the United States, shall be the same as for suits by or against other banks not organized under any law of the United States and which do, or might do, banking business where such national bank may be doing business when such suit may be begun, and declaring all laws inconsistent therewith repealed. *Van Reed v. People's Nat. Bank*, 67 App. Div. 75, 73 N. Y. S. 514; S. C., 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666. Affirmed in 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

No right to attachment against a national bank before judgment in a suit in a state court is given by Act July 12, 1882, c. 290, § 4, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458], making the jurisdiction over suits by or against national banks the same as the jurisdiction over suits by or against banks not organized under any law of the United States. Judgments 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, and 67 App. Div. 75, 73 N. Y. S. 514, affirmed. *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

Act of Congress July 12, 1882 [U. S. Comp. St. 1901, p. 3457] providing that jurisdiction for suits against national banks, except suits between them and the United States, or its officers and agents, shall be the same as jurisdiction for suits against banks not authorized by law of the United States, and repealing all inconsistent acts, did not repeal the earlier acts prohibiting attachments against national banks, and was designed only to prescribe the place where, and the courts in which, such actions could be brought, and was not intended to so regulate the method of commencing action as to enable a state court to acquire jurisdiction over the property without acquiring jurisdiction over the bank. Order 67 App. Div. 75, 73 N. Y. S. 514, affirmed. *Van Reed v. People's Nat. Bank*, 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, affirmed in 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

There is nothing in The National Banking Act of 1882, enlarging the right of attachment against national banks. Before the passage of this section circuit courts of the United States

had jurisdiction of suits against national banks because they were corporations of Federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the federal courts simply upon the ground that they were created by and exercised their powers under the acts of Congress. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54. It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them. Certainly there is nothing in the act repealing the prior provisions of § 5242. *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

26. Illegal and void.—Under the act of congress approved March 3, 1873, § 2, amending Act June 3, 1864, § 57, providing that no attachment shall be issued against a banking association or its property before final judgment, an attachment on warrant issued by a state court, to affect the property of a national bank, is illegal and void. *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601.

27. Bond to dissolve attachment.—*Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Planters', etc., Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

Suit to discharge sureties.—Where the sureties have in their hands assets of the bank (which had subsequently gone into insolvency) which the receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds, and the receiver says there is no liability, because the bonds are invalid, and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them, such a suit is clearly cognizable in equity. The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds, and the suit, although not brought by them,

junction to restrain such proceeding will not be granted in another state where both parties reside, as such proceeding is entirely void.²⁸

Constitutionality of Statute.—The Act of March 3, 1873, Rev. Stat., § 5242, amending § 57 of the National Banking Act of June 3, 1864, provides that attachment shall not issue against national banks or their property until after final judgment is a constitutional enactment.²⁹ If congress has power to authorize the creation of national banks, it has power to protect them and to regulate their trade and intercourse with others, by granting them special immunities and protecting them against suits or proceedings in state courts by which their efficiency would be impaired.³⁰

As Dependent on Solvency of Bank.—³¹There is a line of cases which hold that the proper construction of Rev. Stat., § 5242, the "Banking Act," is that no attachment can be issued against a national banking association, or its property, after it has committed an act of insolvency, which means a condition of inability to meet current pecuniary obligations. The cases are based on the construction that the above provisions only apply to insolvent banks and that congress did not intend to prohibit attachments in cases where the bank is solvent. These cases have been expressly or impliedly over-

is in the nature of an interpleader to save them "from the vexation of two proceedings on a matter which may be settled in a single suit." The decree will bind all alike, and if the sureties are held not to be liable it will conclude the creditors from all further proceedings against them on the bonds, and leave them free to surrender the securities to the receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets of the bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void the judgments are inoperative as a basis of recovery upon the bonds. *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

The statute of the United States prohibits seizure of property belonging to national banks (irrespective of whether they be solvent or insolvent), before final judgment, by virtue of any attachment issued under a state law and returnable to a state court. Any such seizure is therefore void, and a bond given by a national bank to dissolve such attachment served by summons of garnishment is also void. The giving

of such bond is not an appearance in the attachment case so as to make valid a judgment entered up on the bond in that case, against the bank and the sureties executing the bond. The judgment is wholly void, and an affidavit of illegality made and filed by one of the sureties in resistance to a levy upon his property under an execution founded on the judgment, must be sustained. The judgment being wholly void for want of jurisdiction in the court rendering it, affidavit of illegality is a proper defensive remedy. *Planters', etc., Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

28. Proceeding entirely void.—Where attachment has issued from a state court against a national bank before final judgment contrary to Rev. St. U. S., § 5242, an injunction to restrain the proceeding will not be granted in another state where both parties in the attachment suit reside, as the proceeding is entirely void. *First Nat. Bank v. La Due*, 39 Minn. 415, 40 N. W. 367.

29. Constitutionality of statute.—*Dennis v. First Nat. Bank*, 127 Cal. 453, 59 Pac. 777, 78 Am. St. Rep. 79.

30. Power of congress to protect.—*Dennis v. First Nat. Bank*, 127 Cal. 453, 59 Pac. 777, 78 Am. St. Rep. 79, citing *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865.

ruled.³¹ The accepted rule is that the remedy is taken away altogether and can not be used under any circumstances. But it is immaterial whether the bank is solvent or insolvent.³² The United States supreme court has said that

31. Cases basing right to issue attachment on solvency of bank.—*Selma First Nat. Bank v. Colby*, 46 Ala. 435; *Norris v. Merchants' Nat. Bank*, 30 Ill. App. 54; *Market Nat. Bank v. Pacific Nat. Bank* (N. Y.), 30 Hun 50, affirmed in 93 N. Y. 648, reversing 64 How. Pr. 1; *Raynor v. Pacific Nat. Bank*, 49 N. Y. Super. Ct. 119, affirmed in 93 N. Y. 371; *Southwick v. First Nat. Bank*, 7 Hun 96; *Robinson v. National Bank*, 19 Hun 477, 58 How. Prac. 306, affirmed in 81 N. Y. 385; *Bowen v. First Nat. Bank* (N. Y.), 34 How. Prac. 408; *Allen v. Scandinavian Nat. Bank* (N. Y.), 46 How. Prac. 71; *People's Bank v. Mechanics' Nat. Bank* (N. Y.), 62 How. Prac. 422, affirming 27 Hun 53; *National Shoe, etc., Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; *Bank v. City Nat. Bank* (Pa.), 12 Phila. 189; *Holmes v. National Bank*, 18 S. C. 31, 44 Am. Rep. 558.

Under the National Banking Act, an attachment is prohibited, and may not issue out of a state court against a national bank insolvent or on the eve of insolvency. *National Shoe, etc., Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467.

Under Rev. St. U. S., § 5242, making void certain transfers and acts of a national bank while insolvent, or in contemplation of insolvency, and providing that no attachment shall issue against a bank before final judgment in any suit in a state court, the prohibition applies only to insolvent banks. *People's Bank v. Mechanics' Nat. Bank* (N. Y.), 62 How. Prac. 422.

In an action against a national bank an attachment may be issued against the property of the defendant in New York. The prohibition thereof in § 5242 only applies to cases of actual or impending insolvency of the association. *Robinson v. National Bank*, 81 N. Y. 385, 59 How. Prac. 218, 37 Am. Rep. 508, affirming 58 How. Prac. 306, 19 Hun 477.

Rev. St. U. S., § 5242, providing that after an act of insolvency by a national bank no attachment shall be issued against it or its property, before final judgment, in any suit, action, or proceeding, prohibits the suing out of a foreign attachment against a national bank after its insolvency. *Commerce Bank v. City Nat. Bank* (Pa.), 12 Phila. 189.

A suit against a national bank for a

breach of contract may be brought in a state court of a state other than that in which the bank is located; and there is nothing in the federal statutes to prevent an attachment issuing there being no question of insolvency, in such an action before judgment. *Holmes v. National Bank*, 18 S. C. 31, 44 Am. Rep. 558.

32. Remedy taken away altogether—Solvency immaterial.—*Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Garner v. Second Nat. Bank*, 66 Fed. 369; *Frelinghuysen v. Baldwin*, 12 Fed. 395; *Price v. Abbott*, 17 Fed. 506; *Armstrong v. Trautman*, 36 Fed. 275; *Dennis v. First Nat. Bank*, 127 Cal. 453, 59 Pac. 777, 78 Am. St. Rep. 79; *Planters', etc., Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *McDonald v. First Nat. Bank*, 41 Ill. App. 368; *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601; *Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865; *First Nat. Bank v. La Due*, 39 Minn. 415, 40 N. W. 367; *Montreal Bank v. Fidelity Nat. Bank*, 112 N. Y. 667; *Central Nat. Bank v. Richland Nat. Bank* (N. Y.), 52 How. Prac. 136; *Thomp. Nat. Bank Cas.* 801; *Rhoner v. First Nat. Bank* (N. Y.), 14 Hun 126; *Van Reed v. People's Nat. Bank*, 67 App. Div. 75, 73 N. Y. S. 514; *Rosenheim Real-Estate Co. v. Southern Nat. Bank* (Tenn.), 46 S. W. 1026; *Safford v. First Nat. Bank*, 61 Vt. 373, 17 Atl. 748.

Under Rev. St. U. S., § 5242, prohibiting seizure of property of national banks before final judgment, by attachment under the state law, and returnable to a state court, such seizure is void, and it is immaterial whether the bank is solvent or insolvent. *Planters', etc., Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

Rev. St. U. S., § 5242, providing that no attachment before final judgment shall be issued in any state court against a national bank, exempts national banks, whether solvent or insolvent, from attachment under state laws. *Bank v. Fidelity Nat. Bank*, 49 Hun 607, 1 N. Y. S. 852, 17 N. Y. St. Rep. 88, judgment affirmed in 112 N. Y. 667, 20 N. E. 414, following *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

A national bank, whether solvent or insolvent, is within the exemption from

although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and can not be used under any circumstances.³³ Under the New York line of cases it is held that the fact that the bank subsequently paid a large amount of its debts,³⁴ or subsequently acquired further capital,³⁵ is not ground for ques-

the issue of attachment before judgment, which Rev. St. U. S., § 5242 [U. S. Comp. St. 1901, p. 3517], affords in suits in the state courts. Judgments, 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, and 73 N. Y. S. 514, 67 App. Div. 75, affirmed. *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

Rev. St. U. S., § 5242, providing that all transfers of evidences of debt owing to any national bank; all assignments of mortgages, etc., in its favor; all deposits for its use or the use of a shareholder or creditor; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets as prescribed, or with the view of a preference to a creditor, except in payment of its circulating notes, shall be void, and that no attachment shall be issued against such association until final judgment—prohibits attachments against such banks before judgment, whether solvent or insolvent. *Van Reed v. People's Nat. Bank*, 67 App. Div. 75, 73 N. Y. S. 514, S. C., 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, affirmed in 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

Rev. St. U. S., § 5242 [U. S. Comp. St. 1901, p. 3517], prohibiting an attachment before judgment against a national bank by any state court, prohibits an attachment against a national bank, whether solvent or insolvent. Order, 67 App. Div. 75, 73 N. Y. S. 514, affirmed. *Van Reed v. People's Nat. Bank*, 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666, affirmed in 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

Whether § 5242, Rev. St., providing that no attachment shall be issued against a national banking association by a state court before final judgment is general, and applies to all national banking associations, quære. *McCracken v. Covington City Nat. Bank*, 4 Fed. 602, citing *Central Nat. Bank v. Richland Nat. Bank* (N. Y.), 52 How. Prac. 136, *Thomp. Nat. Bank Cas.*

801, as answering the question in the affirmative.

33. *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. C. 718; *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

"The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of § 5242 shows the opinion of the revisers and of congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank." *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718.

After a national bank has failed to redeem one of its circulating notes on presentment, which under Act June 3, 1864, § 46 (13 Stat. 113), is an act of bankruptcy authorizing the controller of the currency to take charge of the bank's assets and administer them for the benefit of its creditors, a state court has no authority to levy an attachment on the assets in a suit by a creditor, since by virtue thereof such creditor would obtain a preference over others, which by § 52 of that act is prohibited; and therefore an attachment so levied will be set aside, or its legal effect destroyed, in a suit by the receiver of the bank subsequently appointed. *Harvey v. Allen*, Fed. Cas. No. 6,177, 16 Blatchf. 29.

34. Subsequent payment of debts.—Under Rev. St. U. S., § 5242, an attachment issued against an insolvent national bank is invalid, and the fact that the bank subsequently paid a large amount of its debts in full does not estop it from questioning the validity of the attachment. *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371.

35. Acquisition of further capital.—An attachment issued against a national bank, which is at the time insolvent, is invalid, under Rev. St. U. S., § 5242, and is not made valid by

tioning the validity of or vacating the attachment. But they further hold that although a bank commits an act of insolvency within said section if it may possibly have assets enough finally to meet all demands, an attachment, therefore, upon the property of a national bank thus situated, should not be granted, or, if granted, should be vacated.³⁶ Under those decisions the burden of showing insolvency in such cases was upon the defendant.³⁷

Attachment against Bank Located in Another State.—There are cases in New York which hold that where a solvent national bank, organized under the laws of the United States, and doing business in another state, has property within this state, an action by attachment may be brought against it as a foreign corporation.³⁸ But the better rule, and the one more

the subsequent acquisition by the bank of further capital. *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371.

36. Mere commission of act of insolvency.—Possession of sufficient capital.—*Market Nat. Bank v. Pacific Nat. Bank* (N. Y.), 30 Hun 50, affirmed in 93 N. Y. 648.

37. Burden of showing insolvency.—Where it is contended that, at the time of the issuing and levy of an attachment against a national bank without the state, such bank was insolvent, the burden of showing that it was insolvent at that time is upon the defendant; and that fact should be made clearly to appear, or else the attachment should be maintained. *Market Bank v. Pacific Nat. Bank* (N. Y.), 2 Civ. Proc. R. 330, 64 How. Prac. 1.

38. Against national bank doing business in another state.—*Allen v. Scandinavian Nat. Bank* (N. Y.), 46 How. Prac. 71.

The amendment of The National Banking Act passed in 1873, providing "that no attachment, injunction, or execution shall be issued against such association or its property before final judgment," etc., relates only to suits against associations located where the suit is brought, and not to causes against a nonresident corporation. *Southwick v. First Nat. Bank* (N. Y.), 7 Hun 96.

National Banking Act 1864, § 57, as amended by Laws 1873, c. 269, § 2, provides that suits and proceedings against any such association may be had in any district, circuit, or territorial court of the United States held within the district in which the association may be established, or in any state or county court in the county in which said association is located; provided, that no attachment * * * shall be issued against such association or its property before final judgment in any such suit in any state or county

court. Held, that suits by attachment against such banks located in another state are not prohibited, as the words "in any such suit" refer to suits in the state or county where the bank is located. *Southwick v. First Nat. Bank* (N. Y.), 7 Hun 96.

The last clause of Rev. St. U. S., § 5242, in relation to national banks, providing that "no attachment shall be issued against the association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court," only applies to such national banks as have committed or are contemplating an act of insolvency, and does not prohibit the issuing of an attachment against the property of a solvent national bank located and doing business in another state. *Robinson v. National Bank*, 19 Hun 477, 58 How. Prac. 306, affirmed in 81 N. Y. 385, 59 How. Prac. 218, 37 Am. Rep. 508.

Although the supreme court of New York has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another state, an attachment which has issued against its property in New York will be vacated upon positive proof of its insolvency. *People's Bank v. Mechanics' Nat. Bank* (N. Y.), 62 How. Prac. 422.

Status as foreign corporation.—A national bank located out of this state is a "foreign corporation," within the meaning of § 227, Code Proc., subjecting foreign corporations to proceedings by way of attachment. *Cooke v. State Nat. Bank*, 3 Abb. Prac., N. S., 339, 50 Barb. 339.

National banks, organized and doing business under the act of congress, are to be regarded as foreign corporations within the provisions of the Code of Procedure, authorizing actions to be brought and attachments to be issued against corporations

in line with the federal court decision, is that an attachment can not be issued by a state court against the property of a solvent national bank located in another state.³⁹

Commencement of Action by Attachment.—Under Rev. St., U. S., § 5242, providing that no attachment shall be issued against a national bank before final judgment in any suit in any state, county, or municipal court, an action against a bank located in another state can not be commenced by attachment of its property here.⁴⁰ Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of Rev. Stat., § 5242, is beyond the power of the court.⁴¹ Such an attachment does not operate as notice to an absent defendant, so as to give the court jurisdiction of the party or subject matter.⁴² The appearance by an attorney of a nonresident national bank, the filing of a plea in abatement, and granting the bank an appeal, will not give the court jurisdiction in a suit in which it was attempted to bring the bank before the court by attachment of debts due it by defendants upon whom process was served.⁴³ So where service is made on a national bank only by attachment and publication or service out of the state, the attachment, being prohibited by Rev. Stat., § 5242, should be vacated, and the service set aside.⁴⁴

Personal Privilege—Waiver.—The rule is that state courts are without jurisdiction to entertain such cases. Jurisdiction can not be conferred even by consent of the parties and the want of it can not be waived by any adjudications. In either case the judgment of the court would be a nullity and the attachment set aside and declared void.⁴⁵ There is a holding that,

"created by or under the laws of any other state, government, or country." These terms are evidently intended to include all corporations formed under the laws of any other government than the one enacting the law, and plainly include the government of the United States. So held where the bank was organized and located within the state. *Bowen v. First Nat. Bank* (N. Y.), 34 How. Prac. 408.

39. Better rule.—*McDonald v. First Nat. Bank*, 41 Ill. App. 368. See ante, this section, catchline, "As Dependent on Solvency of Bank."

Under Rev. St. U. S., §§ 5198-5242, as amended by Act of congress, 1874, an attachment can not be issued against a national bank before final judgment, even though it is incorporated in this state and located in another. *Rhoner v. First Nat. Bank* (N. Y.), 14 Hun 126.

40. Commencement of action by attachment.—*Central Nat. Bank v. Richland Nat. Bank* (N. Y.), 52 How. Prac. 136, *Thomp. Nat. Bank Cas.* 801.

41. Judgments, 173 N. Y. 314, 66 N.

E. 16, 105 Am. St. Rep. 666, and 67 App. Div. 75, 73 N. Y. S. 514, affirmed. *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 25 S. Ct. 775.

42. Operation as notice to absent defendant.—As by Rev. St. U. S., § 5242, an attachment issued before final judgment from a state court against a national bank is prohibited, such an attachment does not operate as notice to the absent defendant, so as to give the court jurisdiction of the party or subject matter. *Safford v. First Nat. Bank*, 61 Vt. 373, 17 Atl. 748.

43. Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn.), 46 S. W. 1026.

44. Garner v. Second Nat. Bank, 66 Fed. 369.

45. Under Rev. St. U. S., § 5242 [U. S. Comp. St. 1901, p. 3517], providing that no attachment shall be issued against a national bank or its property before final judgment in any suit in any state court, a state court has no jurisdiction of an attachment against a national bank before final

though the laws relating to national banks prohibit the issue of attachments out of the state courts against them, this is a personal privilege, and the right to insist on it is waived by pleading the general issue in such attachment proceedings. This case is contrary to the weight of authority and can not be approved.⁴⁶

What Constitutes Attachment within Statute.—Where a national bank purchases a draft with bill of lading of corn attached, which was paid, and the money was in the bank's possession, a suit in equity, in attachment, by the buyer of the corn, against the seller and the bank for breach of contract, and praying a return of the money from the bank, is not an attachment within Rev. St. U. S., § 5242, providing that no attachment shall issue against any national bank or its property before final judgment in any suit.⁴⁷ An attachment sued out against a bank as guarantee is not an attachment against the bank or its property, nor a suit against it within the meaning of this statutory provision. It is merely an attachment to reach the property or interests held by such bank for others.⁴⁸ It follows from what has been said that an action of replevin against a national bank to recover property of the plaintiff in its possession is not prohibited by the statute.⁴⁹ Though attachment against a national bank can not be maintained in a state court, such bank may intervene in attachment and claim the property; and it does not thereby become a party, so as to authorize dismissal of the action.⁵⁰ But if the plaintiff, following the intervention by the bank, bring an action against the bank, in which he again attaches the cotton, a motion of the bank to dissolve the attachment against it should be granted, under Rev. Stat. U. S., § 5242, providing that no attachment shall be brought against a national bank in any state court.⁵¹ And the trusteeing of a debt due to a national

judgment, even by consent of the parties or by waiver of the want of it. *Merchants' Laclede Nat. Bank v. Troy Grocery Co.*, 144 Ala. 605, 39 So. 476, citing *Karthauss v. Nashville*, etc., R. Co., 140 Ala. 433, 37 So. 268; *Rosenheim Real-Estate Co. v. Southern Nat. Bank* (Tenn.), 46 S. W. 1026; *Garner v. Second Nat. Bank*, 66 Fed. 369.

46. Personal privilege—Waiver.—*Norris v. Merchants' Nat. Bank*, 30 Ill. App. 54.

47. What constitutes attachment within statute.—*Russel v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287.

This is no attachment against a national bank, in any proper legal view. The case is in chancery. All the parties are before the court for the adjustment of all the equities. The national bank is a mere claimant of the fund; intervening as such claimant, and preferring its claim. Being in equity, the equities can all be adjusted, and the rights of all parties protected. It is a misconception to

say that the national bank is in this proceeding attached, within the meaning of the United States statute relied on. *Russel v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287.

48. Attachment as guarantee.—*Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146, 20 S. Ct. 915, reversing *Commonwealth v. Chestnut St. Nat. Bank*, 189 Pa. 606, 42 Atl. 300; *Earle v. Conway*, 178 U. S. 456, 44 L. Ed. 1149, 20 S. Ct. 918, affirming *Conway v. Chestnut St. Nat. Bank*, 189 Pa. 610, 42 Atl. 303; *Conway v. Schall* (Pa.), 42 W. N. C. 328.

49. Action of replevin not prohibited.—*Corn Exch. Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635, affirming 37 Hun 473.

50. Intervention by bank.—*Willard Mfg. Co. v. Tierney & Co.*, 130 N. C. 611, 41 S. E. 871.

51. New suit and attachment subsequent to intervention.—*Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. C. 609, 41 S. E. 870.

bank is in effect an attachment of the property of the bank.⁵²

§ 279. — Injunction.—Injunction by Federal Court.—Rev. St., § 5242 providing that no injunctions shall issue from a state court against a national bank before final judgment, does not deprive the federal circuit court of power to issue such an injunction, or to continue, after removal of the case, an injunction previously granted by a state court.⁵³

Power of State Court to Grant Injunction.—The Act of March 3, 1873, § 2, amending the Act of June 3, 1864, § 57, providing that no injunction shall be issued against a national bank or its property before final judgment.⁵⁴ This act was not repealed by Act U. S. 1882, c. 290, § 4, making the jurisdiction of suits against them the same as of those against other banks which are or might be in the same place, nor by Act U. S. 1888, c. 866, § 4, declaring them, for the purpose of suit, citizens of their respective states, and federal jurisdiction so far the same for them as for individuals.⁵⁵ Under its provisions a preliminary injunction can not issue against a national bank.⁵⁶ This provision was intended to prevent the issuance of any such writ in a state court against a national bank.⁵⁷ It is meant not merely to preserve to such banks control of their general assets, but applies to an order restraining the transfer or enforcement of notes as wrongfully pledged to a bank with notice.⁵⁸

Citizenship for Purposes of Injunction Suit.—Under 25 U. S. Stat. 433, providing that all national banking associations shall, for the purpose of actions against them and suits in equity, be deemed citizens of the states in which they are respectively located, a national bank is a citizen of a state for the purpose of a suit to enjoin it from prosecuting an action in another state.⁵⁹

§ 280. — Pleading.—Establishment and Corporate Existence of Bank.—An allegation that plaintiff is a national banking corporation incor-

52. **Trusteeing debt due bank.**—*Saford v. First Nat. Bank*, 61 Vt. 373. 17 Atl. 748.

53. **Injunction by federal court.**—*Hower v. Weiss, etc., Elevator Co.*, 5 C. C. A. 129, 55 Fed. 356, distinguishing *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718. See ante, "Attachment and Garnishment," § 278 catchline, "Power of Federal Court to Issue Attachment."

54. **Power of state court to grant injunction.**—U. S. Rev. Stat., § 5242; *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Rosenheim Real-Estate Co. v. Southern Nat. Bank (Tenn.)*, 46 S. W. 1026.

55. **Rev. Stat., § 5242, not repealed.**—*Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865.

56. **Preliminary writ can not issue.**—*Hazen v. Lyndonville Nat. Bank*, 70

Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

57. **Object of provision.**—Rev. St. U. S., § 5242 [3 U. S. Comp. St. 1901, p. 3517], providing that no attachment or injunction shall issue against a national bank before final judgment in any suit, action, or proceeding, prevents the issuance of any such writ in a state court against a national bank. *Meyer v. First Nat. Bank*, 10 Idaho 175, 77 Pac. 334.

58. **To what statute applies.**—*Freeman Mfg. Co. v. National Bank*, 160 Mass. 398, 35 N. E. 865.

59. **Citizenship for purposes of injunction suit.**—*Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680, citing *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325.

porated under and by virtue of the national banking laws is a sufficient compliance with the statutory requirement of an allegation that it is duly incorporated.⁶⁰ A declaration which describes the plaintiff as "The Third National Bank of Baltimore," is not equivalent to an averment that the plaintiff is a banking association established in the district of Maryland, nor that it is established under the law of the United States providing for national banking associations.⁶¹ In an action in the name of a national bank, an allegation that "plaintiff is a national bank, doing business under the act of congress," is a sufficient averment of its corporate character.⁶² The National Bank Act provides that a company organized pursuant to its terms shall be a body corporate. It is held in many of the cases that, if a corporation sues by a name which imports a corporation, it is not necessary to specially aver corporate existence.⁶³ An allegation in a complaint that the plaintiff is a national bank, and doing business under the act of congress, imports a corporation, and, in effect, avers that it is a corporation.⁶⁴ Some cases hold that, having dealt with plaintiff in its corporate capacity, defendant is estopped from denying its legal existence.⁶⁵ Furthermore, the admission of the execution of notes by defendant company to plaintiff bank in its corporate name is an admission of its corporate existence and power to enter into the contract.⁶⁶

60. Allegation of incorporation.—*Gill v. First Nat. Bank* (Tex. Civ. App.), 47 S. W. 751.

61. Allegations as to establishment and existence of bank.—*Third Nat. Bank v. Teal*, 5 Fed. 503, 4 Hughes 572.

62. Sufficient averment of corporate existence.—*Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

63. Section 5136, Rev. Stat.—*Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 So. 45; *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455; *Wilson & Co. v. Sprague Mowing Mach. Co.*, 55 Ga. 672; *Sayers v. First Nat. Bank*, 89 Ind. 230; *Smythe v. Scott*, 124 Ind. 183, 24 N. E. 685; *Commercial Bank v. Newport Mfg. Co. (Ky.)*, 1 B. Mon. 13, 35 Am. Dec. 171; *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 49 N. W. 223; *Phoenix Bank v. Donnell*, 40 N. Y. 411; *Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331; *Lewis v. Bank*, 12 O. 132, 40 Am. Dec. 469; *Central Bank v. Knowlton*, 12 Wis. 624; *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

64. Allegation importing corporation.—*Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

65. Estoppel to deny corporate existence.—*Jones v. Bank (Ky.)*, 8 B. Mon. 122, 46 Am. Dec. 540; *Bank v. Trimble (Ky.)*, 6 B. Mon. 599; *Depew v. Bank (Ky.)*, 1 J. J. Marsh. 378; *Mackenzie v. Board*, 72 Ind. 189; *Society v. Perry*, 6 N. H. 164; *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

66. Admission of execution of notes as banking corporation.—*Benneson v. Needles*, 52 Mo. 17; *National Ins. Co. v. Bowman*, 60 Mo. 252; *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

A complaint in the name of a national bank alleged that "plaintiff is a national bank doing business under the act of congress," and stated the cause of action to be on notes executed by defendant to the bank. Held, that an admission by defendant that the notes were executed as alleged was an admission of the corporate character of the bank. *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

"We believe it is universally held that the execution of a note to a corporation, by its corporate name, is sufficient prima facie evidence of the existence of the corporation. The admission of the execution of the notes sued on, and their introduction

Whether Foreign or Domestic.—Where the law requires a corporation to allege whether it is a foreign or domestic corporation, a national bank incorporated under act of congress, when beginning suit, must allege whether it is a foreign or domestic corporation, in view of another statute defining corporations created under the laws of the United States located in the state as domestic corporations, and those located outside of the state as foreign corporations.⁶⁷

Designation of Complainant.—A complainant designating itself as the "Citizens' National Bank," instead of "Citizens' National Bank of Watertown," under which title it was incorporated, is not prevented from maintaining its suit where it sufficiently appears that the complainant was the bank to which the certificate of incorporation was issued.⁶⁸

Denial of Corporate Existence.—One who has accepted, as payee, a note made payable at a bank which the parties to the note style a "national bank," and who has sold said note to the bank, can not put in issue the organization of such institution by merely averring want of knowledge or information sufficient to form a belief as to whether it is a body corporate organized under act of congress.⁶⁹

What Constitutes Denial of Corporate Existence.—A denial that plaintiff "is a corporation duly organized as a national bank under the act of congress of June 3, 1864, or any other act," does not put in issue the plaintiff's corporate existence, but denies that its incorporation was legal.⁷⁰ In another instance the court in discussing a similar question said: "This denial is a mere negative pregnant. It does not traverse the corporate exist-

in evidence, therefore established, prima facie, the existence of the plaintiff corporation." *Holmes Fuel, etc., Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

67. **Allegation as to whether foreign or domestic.**—N. Y. Code Civ. Proc., § 1775; N. Y. Code Civ. Proc., § 18; *First Nat. Bank v. Doying* (N. Y.), 13 Daly 509.

A national bank located in New York is a domestic, not a foreign, corporation, and may sue as such. *Market Bank v. Pacific Nat. Bank* (N. Y.), 2 Civ. Proc. R. 330, 64 How. Prac. 1.

A complaint by a national bank, which states that it is duly organized under the National Banking Act, but does not state directly where it is located and doing business, or whether a domestic or foreign corporation, is sufficient, on demurrer, where it is described as a national bank of a city in the state, and that it has done business in that city for more than ten years, under Code Civ. Proc., § 1775, providing that, in suits by or against corporations, the complaint must state whether it is a domestic or foreign

corporation, and, if the latter, in what state or country it was organized. *Farmers', etc., Nat. Bank v. Rogers*, 1 N. Y. S. 757, 15 Civ. Proc. R. 250, 17 N. Y. St. Rep. 381.

68. **Designation of complainant.**—*Citizens' Nat. Bank v. Great Western Elevator Co.*, 13 S. Dak. 1, 82 N. W. 186.

69. **Acceptance of note—Averment of want of knowledge, etc.**—Where a person has accepted as payee a note made payable at a banking institution which the parties to the note style a "national bank," and has sold and transferred the note to the banking institution, he can not put in issue the organization of the corporation by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate organized and doing business under the act of congress. *Hufaker v. National Bank* (Ky.), 12 Bush 287.

70. **Mere denial of legality of incorporation.**—*First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259.

ence of the relation, but only the regularity of the proceedings by which it was incorporated."⁷¹ National banks doing business within the limits of a state and organized there are not believed to be foreign corporations within the principal which requires proof of their corporate existence under a general denial and the issue which that plea raises in some states.⁷²

Allegations as to Cause of Action.—An averment that plaintiff purchased a tax bill for a valuable consideration does not mean necessarily that the purchase was made as an investment or for speculation, but is comprehensive enough to include any acquisition of title by purchase, including, for example, the taking of additional security for an existing debt to the bank created bona fide in the course of lawful business.⁷³ Nothing to the contrary appearing, the allegation that such bank acquired by purchase the title to stock, bonds, or other kinds of paper property implies that the purchase was one it had authority to make.⁷⁴

Plea and Answer.—In an action against a national bank for breach of contract, a plea that defendant was a national bank, and had no authority to carry out the contract on its part, was good.⁷⁵

Ratification of Answer.—Where the filing of the bank's answer follows as a matter of course, and the wording of such answer is a mere matter of

71. Negative pregnant.—Seth Thomas Clock Co. v. Board, 53 Neb. 767, 74 N. W. 254.

72. Effect of general denial.—A national bank doing business within the limits of the state, and organized there, is not a foreign corporation, within the principle which requires proof of its corporate existence under a general denial, and the issue which that plea raises. Hummel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72.

73. Averment as to purchase of tax bill.—First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42.

"So far as we are advised the authority of a national bank to protect itself against possible loss by taking additional collateral security for an existing loan has not been seriously questioned by any court of last resort. It was held in First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679, that while by implication a national bank is prohibited from dealing in stock, it may take stock, in payment or compromise of a doubtful debt, in order to avoid loss and with a view to convert the stock into money. And for the same purpose it may take a mortgage on real estate, National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188, or accept a deed conveying the fee-simple title to real estate." First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42.

74. Implication arising from averment.—First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42.

The allegation of the petition, in an action by a national bank, on a special tax bill, that plaintiff purchased it for a valuable consideration, does not necessarily mean that the purchase was for investment or speculation, which such a bank is not authorized to make, but is comprehensive enough to include the acquisition of title through the taking of additional security for an existing debt created in the lawful course of business, which is permissible; and, in the absence of anything to the contrary, properly implies that the purchase was one it had authority to make. First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42.

Moreover, even if it had appeared that the act in question was ultra vires, the purchase would not be held void, but only voidable. As to defendant, it was valid in any event, and its validity could not be assailed except in a direct proceeding prosecuted for that purpose by the government. Hall v. Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000; First Nat. Bank v. Shewalter (Mo.), 134 S. W. 42, 43.

75. Plea.—Metropolitan Stock Exch. v. Lyndonville Nat. Bank, 76 Vt. 303, 57 Atl. 101.

detail, in pursuance of action already had by the board of directors, the fact that the answer is not formerly ratified at a regular called meeting of the board of directors is immaterial.⁷⁶

Verification.—The cashier of a national bank is the proper person to make the affidavit of the true amount of the indebtedness for which the bank brings suit.⁷⁷

§ 280½. Execution and Enforcement of Judgment.—Execution can not issue against a national bank in any suit, action, or proceeding in any state, county, or municipal court before final judgment against it. This position is rested upon § 5242 of the Revised Statutes of the United States.⁷⁸ Until the comptroller decides to put a national bank into the hands of a receiver under § 5234, there is nothing in the law to support the construction that the bank's tangible assets are exempt from levy under execution upon final judgment. Section 5242 by its terms applies apparently only to "attachment, injunction and execution, * * * before final judgment."⁷⁹

§ 281. Voluntary Liquidation—§ 281 (1) In General.—Under the National Bank Act, a national bank may go into liquidation and be closed by a vote of its shareholders owning two-thirds of its stock.⁸⁰ The statute confers on a national bank the right to liquidate when the owners of two-thirds of the shares thereof agree so to do,⁸¹ and is not limited to insolvent banks,⁸² nor to cases where the interest of all of the shareholders, including the minority, may be best subserved thereby.⁸³ The right may be exercised, though it be contrary to the wishes, and against the interests, of the owners of the minority of the stock.⁸⁴ But it is the duty of the majority stockholders to provide for the collection of the assets, and payment of its debts,

76. Ratification of answer.—Where, at a regularly called meeting of the directors of a national bank, it was voted to tear down the bank building and erect a new building in conformity with certain plans on the bank site, at which meeting W. was present and recorded the only dissenting vote and had then made formal written protest, and plaintiff, his brother, had filed a stockholder's bill making W. one of the defendants to restrain the contemplated action of the bank, it was not material that the bank's answer to the suit was not formally ratified at a regularly called meeting of the directors. *Wingert v. First Nat. Bank*, 99 C. C. A. 315, 175 Fed. 739.

77. Verification—Affidavit of indebtedness.—*Parkhurst v. Citizens' Nat. Bank*, 61 Md. 254.

78. Execution.—*Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *Rosenheim Real-Estate*

Co. v. Southern Nat. Bank (Tenn.), 46 S. W. 1026.

79. Execution after final judgment.—The fact that a national bank, for which no receiver has yet been appointed, is in charge of an examiner appointed by the comptroller to investigate its affairs, does not exempt its tangible assets from levy under execution upon final judgment. *Kimball v. Dunn*, 89 Fed. 782.

80. Voluntary liquidation.—Rev. Stats., § 5220, Fed. Stats., p. 166.

81. Unlimited power of majority.—No limitations are to be found in the national banking laws upon this broad power. *Green v. Bennett (Tex. Civ. App.)*, 110 S. W. 108.

82. Solvent bank.—*Green v. Bennett (Tex. Civ. App.)*, 110 S. W. 108.

83. Interests of minority not considered.—*Green v. Bennett (Tex. Civ. App.)*, 110 S. W. 108.

84. Watkins v. National Bank, 51 Kan. 254, 32 Pac. 914.

and make such disposition of the assets as would be to the best interest of all the stockholders, including the minority stockholders dissenting.⁸⁵

Where Majority Holders Are Officers.—The owners of two-thirds of the stock may vote to liquidate the bank, though they are the directors and the executive officers thereof, since they, as directors and officers, owe no duty to dissenting minority stockholders to continue the bank, where they do not desire so to do.⁸⁶

Where Assessment Ordered.—The owners may elect to liquidate instead of paying an assessment ordered by the comptroller for the purpose of restoring its capital and enabling the bank to continue business.⁸⁷

Exhibit of Books and Papers.—The supreme court has power, in its discretion, to compel the officers of a national bank in process of liquidation, on expiration of its charter by limitation, to exhibit books, papers, and assets of the bank to the stockholders, and to permit them to examine and take extracts therefrom.⁸⁸

Disposal of Assets.—The owners of two-thirds of the stock of a national bank, must, on voting to liquidate the bank, make such disposition of the assets as will be to the best interest of all the stockholders, including minority dissenting stockholders, and this may be done by the directors or by means of a liquidating committee.⁸⁹ One of the liquidating trustees of a national bank may purchase at the sale of the assets of the bank; he being one of the stockholders, and being at auction, after notice to all the stockholders, who alone were interested, the bank being solvent.⁹⁰

Power and Duty of Liquidating Officers.—The act of directors proceeding with the winding up of the affairs of a bank have power to submit

85. This may be done by the directors or by means of a liquidating committee. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

86. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

87. **After assessment ordered.**—Directors of a national bank are not empowered, without action of the stockholders, to levy the assessment ordered by the comptroller for the purpose of restoring its capital and enabling it to continue in business by Rev. St. U. S., §§ 5136, 5145 [U. S. Comp. St. 1901, pp. 3455, 3463], investing them with authority to transact the usual and ordinary business of national banks, since the provision of § 5205 [U. S. Comp. St. 1901, p. 3495], for the appointment of a receiver to close up the business of the banking association in case it fails to pay up its capital stock, and refuses to go into liquidation, evidently confers upon the association the privilege of declining to make good the deficiency, and to elect, instead, to go into volun-

tary liquidation, the exercise of which would seem to be a matter in which the owners, and not the managers, of the bank primarily are interested. *Judgment, Weinhard v. Commercial Nat. Bank*, 41 Ore. 359, 68 Pac. 806, affirmed. *Commercial Nat. Bank v. Weinhard*, 192 U. S. 243, 48 L. Ed. 425, 24 S. Ct. 253.

88. **Exhibit of books and papers.**—Order, 67 App. Div. 627, 73 N. Y. S. 1150, affirmed. *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

89. **Disposal of assets.**—The owners of two-thirds of the stock of a national bank voted to liquidate it. They were the officers of the bank, and became the liquidating committee. Held, that dissenting minority stockholders had a remedy against the liquidating committee for injuries resulting from the failure of the committee to properly dispose of the assets of the bank. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

90. *Cage v. Shapard*, 19 Tex. Civ. App. 206, 46 S. W. 839.

a claim to arbitration and the submission can not be revoked by directors subsequently elected.⁹¹ The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agent is a trust fund for the primary benefit of creditors.⁹²

Right of Minority for Damages to Good Will.—The minority stockholders can not recover for injuries resulting from the destruction of so much of the value of their stock as is derived from the value of the good will of the business.⁹³

§ 281 (2) Effect of Liquidation.—Where a national bank goes into voluntary liquidation it thereby ceases to do business as a going concern.⁹⁴ But it is not thereby dissolved as a corporation,⁹⁵ nor incapacitated to collect its assets and close its affairs,⁹⁶ but may sue and be sued by name for the purpose of winding up its business.⁹⁷ Nothing but a repeal of the charter, or a judicial decree, can effect such a dissolution so as to preclude suits and

91. Power and duty of liquidating officers.—The existing directors of a national bank who proceed without objection, no others being elected to wind up its affairs, may submit to arbitration a claim made against it by one of their number, and such a submission is valid if the vote is unanimous, although he is present at the meeting when it is made; and directors subsequently elected, a majority of whom were not stockholders at the time the liquidation began, have no power to revoke the submission. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

92. Assets as trust fund.—Where the insolvency of a national bank was accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors. *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; and *Frenzer v. Wallace*, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; *Poppleton v. Wallace*, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

93. Right of minority for damages to good will.—The act of liquidation destroys the value of such good will, as a value separate and apart from the value of the tangible assets and in this loss in the value of the stock all stock-

holders proportionately share. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

94. Effect of liquidation.—*Muir v. Citizens' Nat. Bank*, 39 Wash. 57, 80 Pac. 1007.

95. Not dissolved as corporation.—*Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Farmers' Nat. Bank v. Suther*, 28 Okla. 806, 116 Pac. 173.

A resolution of the directors of a bank, that said bank go into liquidation, be closed, and its business cease, and that its franchises be surrendered, does not operate to dissolve the corporation. *Lake Ontario Nat. Bank v. Onondaga County Bank* (N. Y.), 7 Hun 549.

96. Merchants' Nat. Bank v. Gaslin, 41 Minn. 552, 43 N. W. 483.

97. Right to sue.—*Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Farmers' Nat. Bank v. Suther*, 28 Okla. 806, 116 Pac. 173.

The appointment by the shareholders of a national bank of "trustees" to close the affairs of the bank, the title to its property not being vested in them, does not affect the right of the corporation to bring suit on its choses in action. *Merchants' Nat. Bank v. Gaslin*, 41 Minn. 552, 43 N. W. 483.

Before affairs closed.—The liquidating agent of a national bank has authority to sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. *Judgment* (Civ. App.), 45 S. W. 927, reversed in *Nor-*

actions against it to enforce its debts and liabilities.⁹⁸ The bank may elect officers for the purpose of effecting the liquidation.⁹⁹ A national bank which has gone into voluntary liquidation becomes subject to like proceedings as domestic corporations; for instance, to a creditors' bill to reach a fund held by the president.¹

Transfer of Stock.—Where a national bank goes into voluntary liquidation, it thereby ceased to do business as a going concern, and is not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee.²

Dividends.—Liquidation dividends of a national bank belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not, and must be paid to the holder of such shares on demand.³

Interest on Deposits.—If a national bank goes into liquidation, the book accounts of deposits draw interest from the date of suspension; the act of going into liquidation dispensing with demand.⁴

§ 282. — **Reorganization.**—Where a national bank is reorganized into a state bank, which takes all its papers, assumes all its liabilities, and continues the same board of directors, the state bank retains the identity of the national bank, so that it may enforce a written authority held by such bank for the indorsement of commercial paper.⁵

Assumption of Liabilities.—A national bank, the successor of one which went in to liquidation, is liable for deposits therein.⁶ The payment, by the successor of a national bank which had gone into liquidation, of the installments of interest due on government bonds deposited with the old bank, is

wood *v.* Interstate Nat. Bank, 92 Tex. 268, 48 S. W. 3.

Judgment for bank.—A judgment is not invalid because recovered in the name of a national bank after it has gone into voluntary liquidation. *Cage v. Shapard*, 19 Tex. Civ. App. 206, 46 S. W. 839.

Judgment against.—It has been held that a judgment rendered against a national bank which has gone into voluntary liquidation, and to dissolve which proper steps have been taken, is void, and hence may be collaterally attacked. *Hodgson v. McKinstrey*, 3 Kan. App. 412, 42 Pac. 929.

98. *Lake Ontario Nat. Bank v. Onondaga County Bank* (N. Y.), 7 Hun 549.

99. **May elect officers.**—Under Act of congress, July 12, 1882, extending for the purpose of liquidation the franchises of such national banking associations as do not extend the periods of their charters, and making applicable to them the statutes relating to liquidation of banking associations, such an association may continue to elect officers and directors for the pur-

pose of effecting the liquidation. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781.

1. *Merchants', etc., Bank v. Masonic Hall*, 65 Ga. 603.

2. *Muir v. Citizens' Nat. Bank*, 39 Wash. 57, 80 Pac. 1607.

3. *Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me. 500, 36 Atl. 996.

4. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

5. **Reorganized into state bank.**—It was so held under 3 How. Ann. St., § 3208b6, authorizing the reorganization of a national bank as a state bank, and providing that "all assets of said dissolved national bank shall, by act of law, be vested in and become the property of such state bank," etc. *First Commercial Bank v. Talbert*, 103 Mich. 625, 61 N. W. 888, 50 Am. St. Rep. 385.

As to reorganization of state bank into national bank, see ante, "Reorganization of State Bank as National Banks." § 237.

6. *Eans v. Exchange Bank*, 79 Mo. 182.

an admission that such bonds came into the possession of the new bank on its reorganization.⁷

Rights of Officers.—By the provisions of the national currency upon the conversion of a state to a national bank all the directors of the former become those of the latter, until an election or appointment by the national bank. It seems that no oath is required from these ad interim directors.⁸

Rights of Stockholders.—As the minority stockholders have only the right to demand that the assets of the bank be disposed of so that the full value thereof shall be received for distribution among the shareholders, the majority holders, who are also its directors and executive officers, may vote to liquidate the bank, organize a new bank and apportion the stock thereof among themselves, to the exclusion of the minority stockholders of the old bank.⁹ Such transaction may, however, be set aside in equity if unfair.¹⁰ Where a national bank has gone into voluntary liquidation in pursuance of the vote of all its stockholders, and all but one of them have united in organizing a new national bank under a different name, and the omitted stockholder has accepted dividends from the proceeds of nearly all the assets of the old bank, he can not claim to be a stockholder in the new bank, nor a right to share in its earnings.¹¹

§ 283. Consolidation.—Since the National Bank Act recognizes the right of a national bank to wind up its business and consolidate with another such association, a consolidation of two national banks under the direction and sanction of the comptroller of the currency is not void as being ultra

7. *First Nat. Bank v. Strang*, 28 Ill. App. 325.

8. **Rights of officers.**—The oath prescribed by § 9 of the Act of 1864 being designed for those regularly elected by the national bank; but, assuming its necessity, a majority of those who were the directors before its conversion is necessary to make a quorum of the board of the national bank. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

9. **Rights of minority stockholders.**—The owners of two-thirds of the stock of a solvent national bank, who were also its directors and executive officers, voted to liquidate the bank, and organized a new bank, and apportioned the stock thereof among themselves, to the exclusion of minority stockholders of the old bank. They elected themselves directors and officers of the new bank; and, through a liquidating committee composed of themselves, they transferred the assets of the old bank to the new one. Held, that since the minority stockholders had only the right to demand that the assets of the old bank be disposed of so that the full value thereof

should be received for distribution among shareholders, they could not complain of the transaction, in the absence of a showing that the sales were not for full value, and on as favorable terms as could be obtained. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

10. A sale of the assets of a national bank, in process of liquidation by the liquidating committee, composed of the directors of the bank owning two-thirds of its stock, to a bank organized by themselves is not void, but only subject to the closest scrutiny on the part of a court of equity, and subject to be set aside on it being shown that it was not conducted with the utmost fairness, to the end that full value, and the best price obtainable, was realized. *Green v. Bennett* (Tex. Civ. App.), 110 S. W. 108.

11. Such stockholder is estopped from complaining that the greater part of the assets were sold to the new bank, if he knew they were thus disposed of when he accepted his share of the proceeds. *First Nat. Bank v. Marshall*, 26 Ill. App. 440.

vires.¹² The owners of two-thirds of the stock of a national bank voted to liquidate it. They organized a new bank, to the exclusion of minority dissenting stockholders of the old bank. The new bank purchased the assets of the old bank through the liquidating committee, consisting of the directors of the old bank. The transaction did not amount to a consolidation of the two banks, and the minority stockholders were not entitled to a proportionate share of the stock of the new bank.¹³

Rights of Stockholders.—Where a bank consolidated with another, taking all the assets and assuming all the liabilities of the latter, it became a new corporation, whose stockholders were the stockholders of each corporation before consolidation; and hence stockholders of the first bank had no right to the new shares brought in which increased the capital stock.¹⁴

Dissolution of Old Bank.—Where a bank provided for payment of its liabilities by transfer of all its assets to another bank, which assumed its liabilities, and thereafter owned nothing, transacted no business, maintained no organization, and held no meetings, it was not dissolved, and remained capable of being sued in its corporate name.¹⁵

§ 284. Forfeiture of Franchise and Dissolution—§ 284 (1) Grounds.—In General.—The National Banking Act provides for the forfeiture of the rights, privileges and franchises of a national banking association, and for its dissolution whenever the directors themselves violate, or knowingly permit any officers, servants or agent of the association to violate any of the provisions of such act.¹⁶ It is further provided, however, that such violation, before the association shall be declared dissolved, shall be determined and adjudged by a proper circuit, district, or territorial court of the United States.¹⁷

12. Rev. St. U. S., § 5223; Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325 (see 94 Tex. 703, no op.).

13. **Consolidation.**—A petition, in an action by minority stockholders of a national bank against the majority stockholders and a new bank, alleged that the majority stockholders, owning two-thirds of the stock, voted to liquidate the bank, as authorized by Rev. St. U. S., § 5220 (U. S. Comp. St. 1901, p. 3503), that the majority stockholders organized the new bank, and that it purchased the assets of the old bank, and averred, on information and belief, that the directors of the new bank, who were the directors of the old bank, took advantage of § 5223 (U. S. Comp. St. 1901, p. 3504), providing that a bank winding up its business to consolidate with another bank shall not be required to make a deposit with the treasurer of the United States sufficient to redeem its outstanding circulation,

with a view to perpetrate a fraud on the Treasury Department. Held, that the averment on information and belief did not show that the majority stockholders effected a consolidation of the old bank with the new bank, especially since such a conclusion was contradictory to the averments of the petition generally. Green v. Bennett (Tex. Civ. App.), 110 S. W. 108.

14. Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325.

15. Pritchard v. First Nat. Bank, 101 Wis. 86, 76 N. W. 1106.

16. **Provision of National Banking Act for forfeiture and dissolution for violations of act.**—First Nat. Bank v. Colby (U. S.), 21 Wall. 609, 22 L. Ed. 687; Bank v. Pahquioque Bank (U. S.), 14 Wall. 383, 20 L. Ed. 840; Trenholm v. Commercial Nat. Bank, 38 Fed. 322; Mason v. Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Zinn v. Baxter, 65 O. St. 341, 62 N. E. 327.

17. **Necessity for determination and**

§ 284 (2) Effect of Act of Comptroller of Currency in Closing Bank and Appointing Receiver.—The act of the comptroller of the currency in closing the doors of a national bank on account of its insolvency, appointing a receiver, and placing him in charge of the bank's assets to administer them for the benefit of its creditors does not extinguish the corporation, or work a forfeiture of its charter.¹⁸

§ 284 (3) Proceedings to Enforce Forfeiture.—In General.—Under the National Banking Act violations of the act as ground for forfeiture of franchise are determined by the proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name.¹⁹

Limitation of Actions for Forfeiture.—The forfeiture of the rights, privileges, and franchises of a national bank, authorized by § 5239 of the United States Revised Statutes, for violation by its directors of the provisions of the banking act, comes within § 1047, limiting suits for any penalty or

adjudication of violation by proper court.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840.

18. Effect of closing of bank by comptroller and appointment of receiver.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439; *Hutchinson v. Crutcher*, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89.

"Beyond doubt, the appointment of a receiver supersedes the power of the directors to exercise the incidental power necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that necessarily the association is forbidden to pay out of its notes, discount any notes, or bills, or otherwise prosecute the business of banking, but the corporate franchise is not dissolved, and the association, as a legal entity, continues to exist." *Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840, in which case it was held that a creditor might institute suit in a state court against a national bank, after the appointment of a receiver, and prosecute the same to judgment.

A bank organized under the United States currency act as a national bank had failed to redeem its notes, and the comptroller of the currency, under the provisions of the currency act, had appointed a receiver, who had taken possession of its assets, and its affairs were being wound up. A creditor pre-

sented a claim against the bank to the receiver, who disallowed it, and the creditor thereupon brought suit upon it against the bank. Held, that the proceedings of the comptroller had not produced a forfeiture of the franchise of the bank and a dissolution of the corporation, and that therefore the suit would lie against it. *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

Under Act Feb. 18, 1836, incorporating the Bank of the United States, and providing (§ 4, art. 7) that, if the said bank should refuse to pay any of its notes in specie, "the holder or proprietor thereof" may, "at or after the expiration of three months from the first refusal of said bank to pay as aforesaid," apply to any judge of any court in the proper county to allow him to make proof of said refusal, and so proceed to a forfeiture of the charter, it is necessary that the same person should remain the owner of the note, from the time of the first refusal of the bank to pay it until the application is made to the judge to take proof of it. *Lockhart v. Bank* (Pa.), 2 Ashm. 406.

19. Proceedings to enforce forfeiture.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Zinn v. Baxter*, 65 O. St. 341, 62 N. E. 327.

Organization can not be collaterally attacked.—Dissolution of a national bank can be enforced only by proceedings under § 53 of The National Banking Act of congress (13 Stat. 99); its organization can not be impeached collaterally. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531.

forfeiture, accruing under the laws of the United States, to five years.²⁰

Requisites and Sufficiency of Information.—Under § 5239 of the United States Revised Statutes, nothing short of the action of the directors of a national bank by either knowingly violating, or knowingly permitting the officers of the bank to violate, the provisions of the statute, will justify the forfeiture of the charter. It is not, therefore, a sufficient averment in an information seeking a forfeiture of a bank's charter to charge that the association committed a certain act, for that averment could be sustained by simply showing that the cashier or other officer of the bank had done the act complained of; and the act, being within the general scope of his powers, would be a corporate act. The averment in the information must charge either that the act was done by the directors, or that they knowingly permitted some one or more of the officers, agents, or servants of the association to do the acts relied on as a violation of the statute.²¹

§ 284 (4) Effect of Decree of Dissolution and Forfeiture.—A suit against a national bank to enforce the collection of a demand is abated by a decree of a district court of the United States dissolving the corporation and forfeiting its rights and franchises, rendered upon an information against the bank filed by the comptroller of the currency.²² This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation.²³

20. Limitation of action for forfeiture.—*Welles v. Graves*, 41 Fed. 459.

21. Requisites of information seeking a forfeiture for violation of banking act.—*Trenholm v. Commercial Nat. Bank*, 38 Fed. 323.

In an information charging that "the banking association and the directors thereof did knowingly permit," etc., the allegation that the association, aside from the directors, permitted the doing of the alleged acts, tenders an immaterial issue, and should be stricken out on motion. *Trenholm v. Commercial Nat Bank*, 38 Fed 322.

22. Effect of decree of dissolution and forfeiture.—*National Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687.

23. National Bank v. Colby (U. S.), 21 Wall. 609, 22 L. Ed. 687.

"No such enactment is found in the act of congress authorizing the creation of national banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the

abatement of a suit pending against it at the time." *National Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687.

The charter of the United States Bank gave two years after the expiration of the term of incorporation during which the corporate name could be used for the purpose of suing. Act Cong. 1838 (5 Stat. 211), passed before the expiration of said two years, provided that pending suits should not abate, but could be prosecuted as if the two years had not expired. Held to apply to suits in state, as well as in federal courts. *Bank v. Leathers* (Ky.), 8 B. Mon. 126.

A bank may, after the expiration of its charter, continue under its corporate name the prosecution of suits brought by it before the expiration of its corporate existence. *Louisville v. Bank* (Ky.), 3 B. Mon. 138.

The dissolution of a national bank by decree of a federal court does not affect rights of a creditor whose action against the bank was pending at

By express act of congress,²⁴ national banking associations, upon the expiration of the term for which they are incorporated, do not cease to exist, but their franchises are "extended for the sole purpose of liquidating their affairs, until such affairs are finally closed."²⁵ For the proper liquidation of their affairs it is obviously necessary that they should retain the capacity of suing and being sued, and the statutory extension of the franchise accomplishes that result.²⁶

§ 285. Insolvency and Its Effect in General.—As to Power of Comptroller.—It is the intent of Rev. St., §§ 5234, 5236, to throw the entire control of an insolvent bank into the hands of the comptroller of the treasury, for the purpose of facilitating the winding up of its affairs and the payment of its obligations.²⁷ In the case of an insolvent national bank the treasurer represents the United States as a creditor, while the comptroller of the currency is the embodiment of the visitatorial power over corporations created by the government. The 5 per cent. redemption fund is in effect a trust fund held for one purpose—that of redeeming the bank's circulating notes. The treasurer has no power over the fund of an insolvent bank beyond redeeming its notes, and the fund passes to the custody of the comptroller as an asset of the bank.²⁸

Effect as Suspending Exercise of Functions and Powers of Officers.—Delinquent associations whose notes have been protested, and whose officers have been notified by the comptroller that proceedings for liquidation under the act have been instituted, can not lawfully pay out any of their notes, or discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to the association, and to deliver special deposits, which of itself refutes the theory that the association at that state of the proceedings has ceased to exist.²⁹

Effect on Bank's Liability on Contracts Previously Entered into.—There would seem to be no distinction between the liability of an insolvent

the time in a state court. *Bank v. Fidelity Nat. Bank*, 49 Hun 607, 1 N. Y. S. 852, 17 N. Y. St. Rep. 88, judgment affirmed in 112 N. Y. 667, 20 N. E. 414.

A national bank, though it has ceased to do a banking business, has such a corporate existence as enables it in its own name to collect, for distribution among its stockholders, debts contracted with it. *McCann v. Rogers*, 15 Ky. L. Rep. 127.

^{24.} Act July 12, 1882, chap. 290, 22 Stat. 164, § 7 (U. S. Comp. Stat. 1901, p. 3459).

^{25.} **Extension of franchise upon expiration of term of incorporation.**—*Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

^{26.} **Retention of capacity of suing or defending.**—*Cogswell v. Second Nat.*

Bank, 76 Conn. 252, 56 Atl. 574.

^{27.} **Intent of Rev. Stats., §§ 5234, 5236.**—*Jackson v. United States* (U. S.), 20 Ct. Cl. 298.

When an insolvent bank passes into the hands of the comptroller of the currency, the power and duty of the treasurer to collect taxes becomes subject to this control. *Jackson v. United States* (U. S.), 20 Ct. Cl. 298.

^{28.} *Jackson v. United States* (U. S.), 20 Ct. Cl. 298.

^{29.} **Exercise of functions suspended.**—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686. See *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

national bank in the hands of a receiver under the provisions of the National Bank Act, but whose charter has not been judicially, or otherwise, forfeited, and other corporations or individuals whose estates are in insolvency with reference to their liability on contracts competently and in good faith entered into before insolvency.³⁰ The bank act itself creates no such distinction.³¹ All contracts, otherwise lawful, made by a national bank concerning its assets before its failure, albeit at the time such contracts were made the bank was insolvent, are valid, unless the contracts come within the restrictions which the section imposes—that is, those entered into after the commission of an act of insolvency or in contemplation thereof or made with a view to prevent the application of the assets of the bank in the manner prescribed by law or with the purpose of giving a preference to one creditor over another.³² Thus, a national bank leasing premises for a number of years, but becoming insolvent before the expiration of the term, is liable as any other person or corporation for the rent for the balance of the term.³³

Applicability of National Bankrupt Act to Insolvent National Banks.—It would seem to be well established that a national bank is not liable to be proceeded against in bankruptcy.³⁴ The National Bankrupt Act does not repeal or supersede the provisions of the act of congress for winding up insolvent national banks,³⁵ nor can the two acts exist together, as

30. Bank's liability on contracts entered into before insolvency.—*Hartford Deposit Co. v. Chemical Nat. Bank*, 58 Ill. App. 256.

31. *Hartford Deposit Co. v. Chemical Nat. Bank*, 58 Ill. App. 256.

Whatever congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks. *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360.

32. *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

A national bank, after leasing property for a term of years, suspended nine days after the term began. A receiver was appointed who took possession and notified the lessor of his intention to terminate the lease after three months thereof only had expired, paying the rent up to that time. The lease in question was a lawful contract and engagement for the bank to make. The first monthly installment of rent was due under it nine days before the bank suspended. By its terms the default that was

made by the bank in the nonpayment of rent on May 1, gave the right to the appellant to re-enter and terminate the lease. The damages were then matured and could have been at once sued for, or appellant could defer its suit, as it did, until by a reletting of the premises, the extent of damages had been made certain. That they were unliquidated did not render them contingent. It was an existing demand, and the bank remained liable for the rent for the full term. But after the lessor re-entered and relet, only for the difference between the agreed rent and what was obtained on the reletting. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439.

33. Liability on contract of lease.—*Hartford Deposit Co. v. Chemical Nat. Bank*, 58 Ill. App. 256.

34. Insolvent national bank is not liable to bankruptcy proceedings.—*In re Manufacturers' Nat. Bank*, Fed. Cas. No. 9,051, 5 Biss. 499.

35. *In re Manufacturers' Nat. Bank*, Fed. Cas. No. 9,051, 5 Biss. 499.

In general.—The Bankrupt Act of March 2, 1867 (14 Stat. 517), did not repeal or supersede that part of the National Banking Act providing for the winding up of the affairs of an insolvent national bank. *In re Manu-*

furnishing concurrent or coordinate remedies. The remedies prescribed in such case under the Bankrupt Act are not so ample and complete as those under the Currency Act, and the fact that creditors can not of their own motion institute proceedings under the currency act does not change the construction of the acts.³⁶

Title to Deposits Received after Insolvency.—Where the officers of a national bank knowing the bank to be hopelessly insolvent accept a deposit, just previously to such bank's closing its doors, the amount of such deposits is recoverable against the receiver.³⁷ Where a national bank is hopelessly insolvent, to the knowledge of its officers, who have been notified by the comptroller of the currency to make good a certain deficiency, and they make no efforts to comply with such directions, the receipt of a draft offered by a depositor by the bank is a fraud on the depositor, and he is entitled to

facturers' Nat. Bank, Fed. Cas. No. 9,051, 5 Biss. 499.

"It is urged that The Currency Act makes these corporations liable to all suits and actions which might be brought against natural persons, and that they can therefore be proceeded against in bankruptcy. A sufficient answer to this might be found in the fact that when The Currency Act was passed there was no bankrupt law in force, and therefore the general language must be held subject to this limitation. But I take it there is no doubt that the legislative power which creates an artificial person or corporation can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provision of the general bankrupt law would not be held to apply to corporations at all but for the express terms of the act. Should they, then, be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own ingrained into their own constitution and part of their own organic law, by the same authority which enacted the bankrupt law? I think not. Nor does it seem to me that there is any necessary hardship in denying the remedies of the bankrupt law to the creditors of this corporation. There is no evidence that either this petitioning creditor, or any other creditor has applied to the comptroller to take possession and administer the assets. Additional force is also given to this consideration from the fact that in the very latest amendment to the Currency Act it is expressly provided that no attachment, injunction, or execution, shall issue against a bank until judgment is obtained." In re Manufacturers' Nat.

Bank, Fed. Cas. No. 9,051, 5 Biss. 499.

36. In re Manufacturers' Nat. Bank, Fed. Cas. No. 9,051, 5 Biss. 499.

The Bankrupt Act of March 2, 1867 (14 Stat. 517), did not apply to national banks so as to make a proceeding in bankruptcy on behalf of a creditor for winding up the affairs of a national bank a concurrent remedy with the proceedings for such purpose to be instituted by the comptroller of the currency as provided in the National Banking Act, since the comptroller alone can pay holders of circulating notes, distribute the proceeds of bonds deposited, and enforce the liability of stockholders; and this, though the banking act makes such banks liable to all suits which might be brought against natural persons. In re Manufacturers' Nat. Bank, Fed. Cas. No. 9,051, 5 Biss. 499.

37. Recovery of deposits received after insolvency.—*Craigie v. Smith* (N. Y.), 14 Abb. N. C. 409, affirmed 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession. *Richardson v. Olivier*, 44 C. C. A. 468, 105 Fed. 277, 53 L. R. A. 113.

Generally, as to the liability of a bank as trustee, which collects paper after its insolvency, see ante, "Insolvency of Collecting Bank," § 166.

For the general rule as to rights of persons making deposits in a bank after bank's insolvency, see ante, "Rights of Persons Making Deposits after Insolvency," § 75.

recover the proceeds of the draft so long as he can trace them, wherever they may be found.³⁸ The rights of a depositor in a national bank, as such, in case of the bank's insolvency, are not affected by the fact that he is also a stockholder, his duties and liabilities as stockholder being measured by the provisions of the statute; and he has the same right to reclaim a deposit fraudulently received from him when the bank was known by its officers to be in a failing condition as any other depositor, where he had no knowledge of the bank's condition, and did not participate in the frauds of its officers.³⁹ One who deposits checks and drafts in a national bank when it is in a failing condition can not secure a preference for the amount thereof over other creditors on the money in the bank at the time of its failure, without tracing the proceeds of such checks and drafts and showing that such proceeds are included in such cash.⁴⁰ When a bank receives deposits of cash while insolvent, and fails without sufficient money on hand to pay back all of its deposits so received, the law will presume that the money was paid out by the bank in the order that it was received, and that the money on hand is the money of the last depositor, and so on back in the inverse order of the deposits as to time.⁴¹

38. Importers', etc., *Bank v. Peters*, 51 Hun 640, 4 N. Y. S. 599, 21 N. Y. St. Rep. 98, affirming 1 N. Y. S. 89. Judgment affirmed in 123 N. Y. 272, 25 N. E. 319.

39. Rights of a depositor who is also stockholder.—*Richardson v. Olivier*, 44 C. C. A. 468, 105 Fed. 277, 53 L. R. A. 113.

40. Necessity for tracing proceeds of paper into cash in possession of bank.—*Cherry v. Territory*, 17 Okl. 213, 89 Pac. 190.

Generally, as to the rule that the proceeds of paper collected by a bank after insolvency must be traced into the assets of the bank in order to impress upon such assets a trust in favor of the owner of the paper, see ante, "Holding Bank as Trustee," § 166 (1).

41. Presumption where identical funds not traced.—*Cherry v. Territory*, 17 Okl. 213, 89 Pac. 190.

Where a bank is insolvent on the last two days that it transacts business, and receive deposits, and it affirmatively appears from the evidence that there was found in the bank when it closed its doors \$20,000 in cash, and \$12,857.39 was deposited on the last day it transacted business, in an action for a preference by one who deposited on the day before the last on which it received deposits, his recovery of a preference will be

limited to cash on hand less the deposits of the last day; there being no attempt to trace the identical money deposited into any other assets of the bank. *Cherry v. Territory*, 17 Okl. 213, 89 Pac. 190.

When the moneys of the territory are deposited by the territorial secretary in a bank that was insolvent, and it afterwards fails, and the territory is unable to trace the identical funds deposited, it should be confined to the general rules of law regarding presumptions of fact applied to other depositors; and when, under such rules, it is evident that the deposits of the last day on which the bank transacted business belong to other creditors, a preference will be denied the territory as to such deposits, even though no preference is claimed by those entitled thereto; and, under such circumstances, it is immaterial whether or not the secretary had any authority for making such deposit. *Cherry v. Territory*, 17 Okl. 213, 89 Pac. 190.

Where a bank received a deposit while in a failing condition, and when it closed its doors had a sufficient amount of cash to repay such deposits, such payment will not be made in preference to others, where the evidence shows that such cash was deposited by other creditors. *Cherry v. Territory*, 17 Okl. 221, 89 Pac. 192, 8 L. R. A., N. S., 1254.

§ 286. Transfers and Preferences Affected by Insolvency—§ 286 (1) Statutory Prohibition of Preferences.—By the 52nd section of the general banking laws it is provided "that all transfers or evidences of debt owing to any national banking association or deposits to its credit, all assignments of mortgages, sureties or real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable things for its use, or for the use of its shareholders or creditors; and of payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void."⁴²

§ 286 (2) Statute Construed and Applied.—Term "Act of Insolvency," Construed.—The term "act of insolvency," used in § 52 of the Banking Act prohibiting transfers made after the commission of an act of insolvency with a view to prevent the application of its assets in the manner prescribed by the act, means any act which would be an act of insolvency on the part of an individual banker, not simply such an act as authorizes the comptroller, under such act, to appoint a receiver.⁴³ The mere

42. Provision of § 52 of The National Banking Act (United States Rev. Stats. 1874, § 5242, United States Comp. Stats. 1901, p. 3517).—*Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 567, 8 S. Ct. 718; *National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835; *Price v. Coleman*, 22 Fed. 694; *National Security Bank v. Price*, 22 Fed. 697, affirmed in 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281; *Roberts v. Hill*, 24 Fed. 571, overruling 23 Fed. 311; *Armstrong v. Chemical Nat. Bank*, 41 Fed. 234, 6 L. R. A. 226; *In re Armstrong*, 41 Fed. 381; *Spokane v. Clark*, 61 Fed. 538; *Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874, affirmed in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787; *Stapylton v. Stockton*, 33 C. C. A. 542, 91 Fed. 326; *Case v. Citizens' Bank*, Fed. Cas. No. 2,489, 2 Woods 23; *In re Irons*, Fed. Cas. No. 7,067.

Alabama.—*First Nat. Bank v. Johnston*, 97 Ala. 655, 11 So. 690.

Connecticut.—*Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

New Jersey.—*Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12.

New York.—*Bank v. Fidelity Nat. Bank*, 49 Hun 607, 1 N. Y. S. 852, 17 N. Y. St. Rep. 88; *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855; *S. C.*, 63 Hun 625, 17 N. Y. S. 404, 43 N. Y. St. Rep. 744; *Elmira Sav. Bank v. Davis*, 73 Hun 357, 26 N. Y. S. 200, 55 N. Y. St. Rep. 912; *Corn Exch. Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635.

The meaning of § 5242, U. S. Rev. Stat., is not different from the meaning of § 52 of the Act of June 3, 1864, c. 106, 13 Stat. 115. *National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

43. Meaning of term "act of insolvency," as used in § 52 of the banking act.—*Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301. "Insolvency, as ordinarily defined, is that condition of affairs in which a merchant or business man is unable to meet his obligations as that nature in the usual course of his business. *Thompson v. Thompson* (Mass.), 4 Cush. 127; *Vennard v. McConnell* (Mass.), 11 Allen 555; *Wager v. Hall* (U. S.), 16 Wall. 584, 21 L. Ed. 504. An act of insolvency takes place when this state of affairs is demonstrated and the merchant has actually failed to meet some of his obligations." *Roberts v. Hill*, 24 Fed. 571, overruling 23 Fed. 311.

fact that a correspondent of a national bank refuses to pay a check drawn on it by such bank at a time when the account of the latter is overdrawn does not constitute an act of insolvency on the part of the drawing bank, which would render subsequent transfers of property or payments made by it void, as preferences, under the act.⁴⁴

A bank is in contemplation of insolvency within the meaning of the National Bank Act (Rev. St., § 5242), declaring void all transfers of national bank property except in payment of its circulating notes, after an act of insolvency, or "in contemplation thereof," when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations.⁴⁵ In accordance with the general rule that a person is presumed to intend the necessary consequences of his own acts, after a vote of the directors of a national bank to close such bank and go into liquidation, any transfer of the assets of the bank to a creditor whereby that creditor secures a preference will be presumed to be made with a fraudulent intent.⁴⁶

Meaning of "Evidences of Debt" or "Assets" as Used in Act.—Notes given in renewal of other notes held by a national bank, the original notes not being returned to the maker, are not "evidences of debt," or "assets," within the meaning of the act.⁴⁷

Transactions Coming within Prohibition of Statute.—Under the provisions of the National Banking Act any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action,

44. *Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874, affirmed in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787.

45. **When bank in contemplation of insolvency.**—*Roberts v. Hill*, 24 Fed. 571, overruling 23 Fed. 311.

46. **Presumption as to fraudulent intent where transfer made after decision of directors to close bank.**—*National Security Bank v. Price*, 22 Fed. 697, affirmed in 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

47. **Notes given in renewal of other notes held by national bank not "assets" or "evidences of debt."**—*First Nat. Bank v. Johnston*, 97 Ala. 655, 11 So. 690.

"The object of this statute, manifestly, is to secure the preservation, and distribution among all its creditors, of the assets belonging to the bank, fairly and without preferences. By its terms it operates only upon notes, and other evidences of debt, owing to any national bank, and which are assets of such bank. Preferential transfers of such notes, only, are avoided

by this statute. Transfers by the bank of notes and other evidences of debt in its possession, which are not part of its assets, but the property of another, are not within the letter or influence of this statute, and the validity of such transfers must be determined independently of its provisions. *Corn Exch. Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635. The notes sued on in this action were never evidences of debt owing to the Sheffield National Bank, nor any part of its assets, within the meaning of this statute. They were executed by appellee for a specific purpose only, viz, in renewal and extension of two original notes which were to have been delivered up; and when they were sent by appellee to the Sheffield National Bank for that purpose they could only have become assets of that bank, and owing to it, by taking the place of the original notes evidencing the debt the new notes were intended to renew or extend. Until they were so applied, the position of the Sheffield bank in respect of said notes was nothing more than that of a bailee." *First Nat. Bank v. Johnston*, 97 Ala. 655, 11 So. 690.

securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden.⁴⁸ The act makes void all payments and settlements which are made to one creditor, to the exclusion of other creditors, after the commission of an act of insolvency.⁴⁹ It is sufficient to invalidate a transfer that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed, or with a view to the preference of one creditor to another.⁵⁰ A transfer is void if the insolvency is in the contemplation of the bank making the transfer, although the party to whom it is made does not know or contemplate the insolvency of the bank.⁵¹ Where property is transferred by a bank to a creditor to avoid

48. Transactions coming within prohibition of statute against preferences.—*Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

49. Invalidity of settlements and payments to certain creditors to exclusion of others.—*Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301.

50. National Security Bank v. Butler, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

51. Transfer void, though transferee does not know or contemplate bank's insolvency.—*Case v. Citizens' Bank*, Fed. Cas. No. 2,489, 2 Woods 23; *Roberts v. Hill*, 24 Fed. 571; *National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281; *Ball v. German Bank*, 109 C. C. A. 498, 187 Fed. 750.

It was a custom between defendant bank and a national bank in the same town for each to cash checks drawn on the other during the day's business, and after banking hours to take an account of such payments, and for the bank against which the balance was found to give a duebill for the amount, which was taken up on the next day by cash or draft, and the checks were then surrendered for debit against the drawers. Two drafts given defendant in settlement of such balances on successive days having been dishonored, defendant's president called on the cashier of the national bank after banking hours on Saturday, and requested collateral to cover the amount, which was given, amounting to \$5,500. The national bank was then insolvent, and did not again open its doors, and that it could not do so was then known to the cashier. Held that, whatever other remedy it might have had, defendant by demanding collateral elected to affirm the relation of debtor and

creditor between the two banks; that the transfer of the collateral by the cashier of the national bank was at least in contemplation of an act of insolvency, and with a view of preferring defendant as a creditor, within the meaning of Rev. St., § 5242 (U. S. Comp. St. 1901, p. 3517), and was void under said section, regardless of whether or not defendant knew the condition of the other bank. *Ball v. German Bank*, 109 C. C. A. 498, 187 Fed. 750.

Rev. St., § 5242, makes void all transfers of evidences of debt owing to any national bank, or of deposits to its credit, and all payments made after the commission of an act of insolvency, or in contemplation thereof, with a view to prefer a creditor, except in payment of its circulating notes. The P. Bank, not being a member of the clearing house, deposited with the S. Bank all checks received by it to be collected through the clearing house, and was credited as depositor. The directors of the P. Bank, having, one Saturday after closing, determined to go into liquidation, dispatched a committee to confer with the comptroller of the currency as to a receiver. The appointment was made about 10 a. m. on Monday. Monday morning the cashier of the P. Bank sent checks and drafts to the S. Bank, and with them his check for the whole amount of the bank's deposits, and received a negotiable certificate of deposit of the S. Bank, which also held the P. Banks' negotiable certificate. The transaction occurred about 9:30 a. m., when no officer of the S. Bank suspected that the P. Bank was insolvent. Held, that the cashier must have presumed that the S. Bank still held its certificate, and that in sending checks and drafts he was making a transfer to prefer, and the S. Bank could not set off the P. Bank's certificate against

paying him the amount due him, and thus postpone the failure of the bank, it is none the less fraudulent and void.⁵² Where a clearing house association is in the possession of certain money as the fiduciary agent of a bank without a lien or right upon such money, its appropriation of the same after the insolvency of the bank to a debt owing for loan certificates is a preference within the inhibition of the statute against preferences.⁵³

Transactions Held Not to Be Prohibited by the Statute.—The provisions of the National Banking Act, contained in §§ 5234, 5236 and 5242, which require a pro rata distribution of the assets of an insolvent national bank and forbid preferences, do not invalidate liens, equities, and rights arising prior to and not in contemplation of insolvency.⁵⁴ The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency.⁵⁵ The act is directed to a preference, not to the giving of security when a debt is created;⁵⁶ and if the transaction be free from fraud in fact, and is intended merely to protect adequately a loan made at the time, the creditor can retain property transferred to secure such a loan until the debt is paid, though the debtor is insolvent, and the creditor has reason at the time to believe

its own. *National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

52. Transfer of property to creditor to postpone failure of bank.—*Roberts v. Hill*, 24 Fed. 571, overruling 23 Fed. 311.

53. Appropriation by clearing house association of money to debt due from insolvent bank.—By special agreement of a national bank, holding a large amount of clearing-house certificates, instead of the usual deposit of securities as collateral for payment of its daily balance at the clearinghouse, each day left with the clearing-house manager all checks drawn on it, and other evidences of its indebtedness received from other banks, to be held until the balance due from it for the day was paid. On a certain day its claims against other banks amounted to \$70,005.36, while the claims against it amounted to \$117,035.21. While the vouchers representing these claims against it were held by the manager of the clearing house to secure the balance it owed, it was closed by the comptroller of the currency. Thereupon the clearing house collected the amount of the checks, etc., constituting a part of the \$117,035.21, from the banks from which they were received; and the balance of that amount, consisting of

the duebills given by the bank for its balance of the preceding day, which, by agreement, were to be paid by way of set-off in the clearing, the manager collected by reducing to that extent the credit of \$70,005.36 given to the bank on account of the amount owing to it from other banks, and what remained of that credit was applied on the loan-certificate account of the bank to the association. Held, that the receiver of the bank was not entitled to the entire \$70,005.36 irrespective of the outstanding duebills which it had agreed should be set off in the clearing, but the clearing house had no right to apply to the certificate loan account the balance after deducting those duebills, and such appropriation of that balance was a preference, within the inhibition of Rev. St. § 5242. *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835.

54. Prohibition of statute inapplicable to liens, equities or rights arising prior to insolvency and not in contemplation thereof.—*Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

55. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

56. *Armstrong v. Chemical Nat. Bank*, 41 Fed. 234, 6 L. R. A. 226; *Stapylton v. Stockton*, 33 C. C. A. 542, 91 Fed. 326.

that to be the fact.⁵⁷ The transfer by a bank of property to indemnify sureties on a bond given for the dissolution of an attachment against the bank, by certain creditors, can not be held to have been made with a view to giving a preference, or of preventing a distribution of assets as provided by law.⁵⁸ Payments made by a national bank before commission of any act of bankruptcy, and not in contemplation thereof, but in the ordinary course of business, are not invalidated by Rev. St., § 5242, though the bank is in fact insolvent at the time.⁵⁹ So long as a national bank is a going concern, carrying on its business as usual, and has committed no act of insolvency, and it does not appear that a present suspension of business is contemplated by its officers, though it is actually insolvent, to their knowledge, payments or remittances made or caused to be made to a correspondent bank in the due course of its daily business can not be said to have been made in contemplation of insolvency, or with a view to prefer the correspondent as a creditor, within the meaning of Rev. St., § 5242, making such payments void.⁶⁰ Pay-

57. Validity of securities given to protect loan.—*Armstrong v. Chemical Nat. Bank*, 41 Fed. 234, 6 L. R. A. 226.

Rev. St., § 5242, making void any transfer of property or payment of money by a national bank when insolvent or in contemplation of insolvency with a view to prefer a creditor or to prevent the application of its assets in the manner prescribed by the statute, has reference to the payment of securing of existing debts, and does not render invalid transfers by way of security for a loan then obtained, and of which all creditors presumptively receive the benefit, although, as a part of the same transaction, it is agreed that the security given shall also stand as security for an antecedent indebtedness to the person making the loan. While such agreement is invalid, if the creditor acts in good faith, and in the belief that the bank is solvent, it does not deprive him of the right to the security, to the extent of his present advances. *Stapylton v. Stockton*, 33 C. C. A. 542, 91 Fed. 326.

A national bank obtained a loan at a time when it was in fact insolvent, although it was not known to be so by the lender. As security the president executed a deed of the bank building and lot. Held, that the fact that such deed was not recorded until the day the bank closed its doors did not entitle the general creditors of the bank to have it set aside, where there was no agreement to withhold it from record, and under the laws of the state it was good as a mortgage, as between the parties, though not recorded.

Stapylton v. Stockton, 33 C. C. A. 542, 91 Fed. 326.

58. Transfer of property to indemnify sureties on attachment bond.—The Pacific National Bank of Boston suspended November 18, 1881, but, after examination, resumed March 18, 1882, with the consent of the comptroller of the currency, and continued to transact business until May 22, 1882, when it again failed. Between March 24, 1882, and April 28, 1882, certain creditors, whose claims had been disputed and placed in a suspense account, attached the property of the bank, whereupon the bank gave bond with the president and a director as sureties, and the attachments were dissolved. The bank transferred to the sureties, March 22, 1882, a certificate of deposit for \$100,000 on another bank, which, on April 13, 1882, was exchanged for other property. Held, that such transfer was not made after the commission of an act of insolvency by the bank, or in contemplation thereof, and with a view to a preference or to prevent the application of the assets as prescribed by the banking act. *Price v. Coleman*, 22 Fed. 694.

59. Payments made in ordinary course of business, and not in contemplation of insolvency.—*Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874, affirmed in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787.

60. Validity of remittance to correspondent bank in course of daily business.—*McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787, affirming decree in

ments of a certificate of deposit by an insolvent national bank more than six weeks before its suspension, and at a time when it was in apparent good standing, and its insolvency known only by its cashier, who fraudulently concealed it, and when there was no evidence to show an intent on the part of the cashier to give preference to the depositor, is not void.⁶¹ The fact that the depositor is a director does not render him liable for the payment, where he acted in good faith, and was ignorant of any wrongdoing or of the bank's insolvency.⁶² Where a party has been fraudulently allowed to deposit a check in an insolvent national bank, and after the appointment of a receiver seeks to rescind and recover back such deposit, he does not claim under any transfer or assignment from the bank, but under his original title; and hence his claim is not within U. S. Revised Statutes, § 5242, forbidding preferential claims or assignments and enforcing equality of distribution among creditors.⁶³ Section 5242 of the Banking Act does not prohibit a bank which has in good faith accepted the draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the proceeds of collections made by it on paper in its hands belonging to the insolvent bank to the payment of the draft.⁶⁴

Hayden v. Chemical Nat. Bank, 28 C. A. 548, 84 Fed. 874.

When a national bank indebted to another bank makes remittances to it by mail in the ordinary course of business, title thereto passes when the letter is placed in the mails; so that, if made in good faith, not after an act of insolvency, or in contemplation thereof, and innocently received by the creditor, the latter may apply them to cancel the indebtedness, though the remitting bank in fact fails before they are received. 80 Fed. 587. affirmed in *Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874, affirmed in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787.

Remittances made by a national bank to its correspondents, in the ordinary course of business, before the commission of any act of insolvency, are not void under Rev. St., § 5242, though the bank is in fact insolvent at the time, and is closed by the bank examiner before the remittances are actually received by the correspondent banks. *Hayden v. Chemical Nat. Bank*, 80 Fed. 587; S. C., 28 C. C. A. 548, 84 Fed. 874, affirmed in *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787.

Where a national bank has, during a series of years, kept an account with another bank, against which it has drawn in the daily course of its business, and has also constantly made re-

mittances to its correspondents, through the mails, in the form of checks of third parties, for collection and credit to its said account, there is an implied general agreement and understanding that such remittances are in the nature of payments on account, and their deposit in the mail is a delivery to the correspondent, whose property therein is not destroyed or impaired by the suspending of the sending bank or the appointment of a receiver therefor before their actual receipt; nor is it affected by the fact that in case the paper remitted should be destroyed in transmission, or prove uncollectible, the loss would fall upon the remitting bank. *Hayden v. Chemical Nat. Bank*, 28 C. C. A. 548, 84 Fed. 874, affirmed. *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, 19 S. Ct. 787.

61. Payment of certificate of deposit six weeks prior to suspension of bank.—*Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855; S. C., 63 Hun 625, 17 N. Y. S. 404, 43 N. Y. St. Rep. 744.

62. Immaterial that depositor was a director in bank.—*Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855.

63. Recovery of deposit fraudulently received not prohibited as a preference.—*Armstrong v. Warner*, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466, affirming 21 Wkly. L. Bull. 124, 10 O. Dec. 426.

64. Application of proceeds of paper belonging to insolvent bank to payment of its draft.—*In re Armstrong*, 41 Fed. 381.

§ 286 (3) Right of Debtor to Set Off Claim against Bank.—According to numerous decisions it would seem that where a national bank becomes insolvent and its assets pass into the hands of a receiver, a debtor of the bank can set off against his indebtedness the amount of a claim he holds against the bank, supposing the debt due from the bank to have been payable at the time of its suspension,⁶⁵ and the allowance of any valid set-off, legal or equitable, which a debtor of the bank has against any obligation owing by him to it at the time of its insolvency, is not the creation of a preference prohibited by § 5242 of the United States Revised Statutes.⁶⁶ Thus, in an action at law by the receiver of a national bank on a note, the maker may plead as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the lien of the United States and general creditors attached.⁶⁷

65. Set-off by debtor of claim against bank.—*Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148. See also, *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; *Blount v. Windley*, 95 U. S. 173, 24 L. Ed. 424; *Snyders' Sons Co. v. Armstrong*, 37 Fed. 18; *Yardley v. Clothier*, 49 Fed. 337; *Armstrong v. Warner*, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466.

A set-off may be pleaded in an action brought by a receiver of an insolvent national bank. *Hade v. McVay, etc., Co.*, 31 O. St. 231.

Rev. St. U. S., § 5242, which requires a pro rata distribution of the assets of an insolvent national bank, and forbids preferences, does not prevent a debtor of the bank from setting off against the indebtedness the amount of a claim he holds against the bank; and it is immaterial whether or not the debt due to the bank had matured at the time of its insolvency. *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314, following *Farmers', etc., State Bank v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

Equitable set-off not maintainable in court of law.—A circuit court of the United States sitting in Ohio as a court of law has not jurisdiction to entertain a defense of set-off as against an action brought by a receiver appointed by the comptroller of the currency to wind up the affairs of a national bank doing business in Ohio, because of its insolvency, upon a note held by said bank, which note matured and became payable after the appointment of such receiver. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

66. Allowance of set-off not within prohibition of United States Rev. Stats., § 5242 as to preferences.—*Armstrong v. Warner*, 49 O. St. 376, 31 N. W. 877, 17 L. R. A. 466.

"Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent." *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

In *Snyders' Sons Co. v. Armstrong*, 37 Fed. 18, Hammond, J., in referring to United States Rev. Stats., § 5242, says: "I should not hold our act of congress to have abrogated so important a principle of the administration of insolvent estates as the right of set-off, except upon the most explicit declaration to that effect, or the most imperative implication arising out of the necessities of construction. * * * The receiver is, in my judgment, under the act of congress, only an insolvency assignee representing in his relation to the depositors, on the subject of set-off, the bank itself. * * * And it seems to me plain that that section is no more in the way of allowing a set-off where the note passed into the hands of the receiver before maturity than where it passed to him after it became due."

67. Adams v. Spokane Drug Co., 57 Fed. 888, 23 L. R. A. 334, following *Yardley v. Clothier*, 49 Fed. 337.

Rev. Stats., § 5242, makes payments of money by an insolvent national bank to shareholders or creditors, with a view to preference, or to evading the disposition of assets as

The indorser of a note, which is discounted by a national bank, and which matures after the bank becomes insolvent and a receiver is appointed, is entitled to set-off against the note the amount of his deposits in the bank at the time of its failure.⁶⁸ The rule is otherwise, however, where the claim sought to be offset is acquired after the act of insolvency, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of the provisions of the statute against preferences.⁶⁹

required by statute, null and void. Sections 5234 and 5236 require the receiver, after collecting the debts, etc., to turn over all the money to the United States treasurer for a ratable distribution among creditors. Held, that funds received on the discounting of a note, and deposited with the discounting bank, subject to the check of the depositor, and which had been drawn on by him, but were intended by him to meet the note when due, can be pleaded as a set-off in an action on the note brought by the receiver of the discounting bank. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148, reversing 36 Fed. 63.

A promissory note was executed to a national bank in consideration of the amount being placed to the credit of the maker on the books of the bank. The maker thought, and had good reason for thinking, that the bank was solvent, but the managing officer of the bank knew it to be insolvent. Before the note matured, the charter was forfeited for insolvency, and a receiver appointed. Held, that the undrawn balance should be allowed as an equitable set-off to the note, and such allowance is not a "preference" forbidden by the national banking law. *Rev. St.*, §§ 5234, 5236, 5242. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

Since the receiver of a national bank takes the assets of the bank subject to subsisting rights between the bank and its customers, a depositor who is indebted to the bank on a note may set off the amount of his deposit against the amount due upon the note as if the bank were solvent. *Clots v. Bently* (N. Y.), 5 Alb. L. J. 286.

68. Right of debtor to set off amount of his deposit at time of bank's failure.—*Yardley v. Clothier*, 2 C. C. A. 349, 51 Fed. 506, 17 L. R. A. 462, affirming 49 Fed. 337, disapproving *Armstrong v. Scott*, 36 Fed. 63, and *Stephens v. Schuchmann*, 32 Mo. App. 333.

In an action against the indorser of a promissory note which matured in the hands of plaintiff, as receiver of an

insolvent national bank, defendant's deposit in the bank can not be made the subject of a set-off, as the claim therefor existed before the receiver's right accrued, and its allowance would be contrary to the spirit of *Rev. St. U. S.*, § 5242, making payments of money by an insolvent national bank to shareholders or creditors, with a view to preference, or to evading the disposition of assets as required by statute, null and void, and § 5234, requiring the receiver, after collecting debts, etc., to turn over all money to the United States treasurer for a ratable distribution among creditors. *Stephens v. Schuchmann*, 32 Mo. App. 333.

69. Set off of claim acquired after insolvency forbidden.—*Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200.

Under *Rev. St. U. S.*, § 5236, providing that the comptroller of the currency, after providing for the redemption of the notes of an insolvent national bank, shall make a ratable dividend of the money paid him by its receiver among those who proved claims against it, and § 5242, providing that transfers of notes owing a national bank, made after it has committed an act of insolvency, to prevent such application of its assets, shall be void, the maker of a note held by an insolvent national bank can not, in defense to an action thereon by its receiver, offset a claim against the bank which was assigned to him after the bank suspended, and before the receiver was appointed. *Davis v. Knipp*, 92 Hun 297, 36 N. Y. S. 705.

An act of a receiver of a national bank, in allowing a certificate of deposit issued by such bank as an offset to a note due the bank, signed by the holder of the certificate and another, is void, in the absence of an order of court authorizing it, where such certificate was transferred to such holder after the bank became insolvent. *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200.

Where an insolvent national bank

Such transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed.⁷⁰

§ 287. Assets and Receivers on Insolvency—§ 287 (1) In General.—Liability of Assets for Debts of Bank.—By express provision of the United States Revised Statutes the assets of a national bank at the time of its suspension are made liable for the debts of the bank.⁷¹ What is not identifiable as belonging specifically to anybody else,⁷² comes to the hands of the receiver as assets of the bank, and, under the National Banking Act, must be ratably apportioned amongst all its creditors.⁷³ The assets of

is placed in the hands of a receiver, all unsecured creditors are placed upon the same footing by the provisions of the national banking law. Therefore an unsecured depositor, having at the time of the receiver's appointment no right of set-off against a debt which he owes the bank, but which has not matured, does not, on the maturity of the debt, become entitled to use his deposit as a set-off. *Armstrong v. Helm*, 13 Ky. L. Rep. 460.

T. gave to the V. National Bank his bond for \$65,000, with warrant of attorney to confess judgment, and at the same time deposited \$31,000 United States bonds as collateral. R. had to his credit in the bank \$43,000. The bank, being insolvent, stopped payment. On the next day R. assigned his deposit to T., and on the same day the bank entered judgment against T. on his bond. Held, that T. could not set off the deposit against his indebtedness to the bank, as to allow him to do so would secure him a preference over other creditors of the bank, after the acts of insolvency, and would conflict with §§ 50, 52, Act Cong. June 3, 1864, relating to national banks. *Venango Nat. Bank v. Taylor*, 56 Pa. 14.

70. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

71. **Liability of assets at time of suspension for debts of bank.**—United States Rev. Stats., § 5228. *Louisiana Ice Co. v. State Nat. Bank (La.)*, 1 McGloin 181.

72. *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128.

Plaintiff furnished securities to the cashier of a national bank, the insolvency of which was concealed from her, to be pledged as security for a note of the cashier, the proceeds of which were placed to the credit of such bank with its reserve bank. A portion of such proceeds was applied to the payment of an overdraft due the re-

serve bank, and the remainder stood to the credit of the insolvent bank at the time a receiver was appointed therefor, and came into his hands. Held, that plaintiff, having paid the note to release her securities, was entitled to recover from the receiver the portion of the proceeds which came into his hands, and, as to the remainder, was entitled to be subrogated to the right to dividends of the reserve bank, whose indebtedness it paid. *Hallett v. Fish*, 123 Fed. 201.

73. Rev. Stats. U. S., §§ 5236, 5242 (U. S. Comp. St. 1901, pp. 3508, 3517); *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

The closing of a national bank by order of the examiner, the appointment of a receiver, and its dissolution by decree of an equity court, necessarily transfer the assets of the bank to the receiver. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

The comptroller having notified a national bank that its capital was impaired, it was agreed that it might continue business on the directors putting in \$100,000 in cash, and retiring that amount of objectionable securities. That sum was contributed; the account being opened with trustees appointed by the directors to manage the fund, with full power, as far as the bank was concerned, and to account therefor to the contributors in such manner as to protect the equities of each individual and the bank. It was understood between the trustees and the examiner that the securities to be retired were to be designated by the comptroller or examiner, but there was no such understanding with the comptroller. The full amount of objectionable securities had not been selected and given to the trustees when the bank was closed, the receiver taking and proceeding to collect the whole assets. Held, that the

a national bank in the hands of a receiver constitute a trust fund, in behalf of all creditors having claims thereon valid and in full life when the receiver was appointed, which the statute of limitations does not touch or affect.⁷⁴

Disposition of Property Not Belonging to Bank.—The prohibition of Rev. St. U. S., § 5242, against the issue of attachments, injunctions, and executions from state courts against the property of national banks, does not prohibit a requisition to the receiver to deliver up property belonging, not to the bank, but to the party in whose favor the requisition issues.⁷⁵ Rev. St. U. S., § 5228, making the assets of a national bank at the time of its suspension liable for the debts of the bank, does not apply to a certified check on a second bank deposited with it for collection only.⁷⁶ Where, at the time a national bank was placed in the hands of a receiver, another corporation had on deposit therein a certain sum of money, and was also liable to the bank on distinct contracts, such other corporation had the right to direct the application of the money so on deposit.⁷⁷

Trust Funds in Bank's Custody.—There is no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks, or other property in their possession to which they have no title, and it is clear that the state courts have jurisdiction to determine whether certain money was or was not a trust fund belonging to plaintiff.⁷⁸ The rule that officers of an insolvent national bank can not make preferential payments does not militate against the position that a trust fund received in such a manner that the ordinary relation of debtor and creditor if not established, should properly be returned intact, either by the insolvent bank or by the

receiver was not required to account for the balance of the \$100,000 as a special trust fund, but merely as a debt. *Booth v. Welles*, 42 Fed. 11.

In a suit in chancery, under the United States statute of June 30, 1876, by a creditor of a national bank on behalf of himself and all other creditors, against the stockholders of such bank, to enforce their individual liability for the payment of claims against the bank, the fund obtained is a part of the general assets of the bank, and all creditors stand upon an equal footing in the distribution of it. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591.

When a national bank has been placed in the hands of a receiver as insolvent, the federal law becomes from that moment the law of the distribution of its assets to the exclusion of the law of any state; and a second bank, which holds a deposit of funds of the insolvent bank, against which the latter has drawn drafts which have not been paid, can not pay the same after notice, and set up the payment as a defense to an action by the re-

ceiver to recover the deposit, although by the law of the state in which the second bank is located a draft or check is held to be an assignment pro tanto of the fund on which it is drawn; since by the federal law it is not such an assignment as entitles the holder to a preference over the other creditors when the drawer has become insolvent before payment. *First Nat. Bank v. Selden*, 56 C. C. A. 532, 120 Fed. 212, 62 L. R. A. 559.

74. *Riddle v. First Nat. Bank*, 27 Fed. 503.

75. **Detention of property in custody of bank but not owned by it.**—*Corn Exch. Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635.

76. **Checks deposited for collection only.**—*Louisiana Ice Co. v. State Nat. Bank (La.)*, 1 McGloin 181.

77. **Right of depositors indebted to bank to direct disposition of deposit.**—*Tourtelot v. Whithed*, 9 N. Dak. 407, 84 N. W. 8.

78. **Trust funds not included.**—*Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. Ed. 502, 19 S. Ct. 202.

receiver subsequently appointed.⁷⁹

Deposits Accepted by Bank with Knowledge of Its Insolvency.—The amount of a deposit accepted by the officers of a national bank, knowing the bank to be hopelessly insolvent, is recoverable against the receiver.⁸⁰

§ 287 (2) Appointment or Election of Receiver, or Agent of Stockholders—§ 287 (2a) Manner—§ 287 (2aa) Appointment of Receiver by Comptroller of the Currency.—In General.—In certain contingencies,⁸¹ the comptroller of the currency is expressly authorized to ap-

79. Duty of bank or receiver to return trust funds.—*Flint Road Cart Co. v. Stephens*, 32 Mo. App. 341.

Money placed in the hands of the cashier of an insolvent national bank to indemnify him as surety on an attachment bond is a trust fund, although mingled with the bank's funds, so that it went into the receiver's hands with the general assets. *Flint Road Cart Co. v. Stephens*, 32 Mo. App. 341.

A national bank operated a creamery corporation, agreeing to pay patrons the proceeds of butter manufactured from milk delivered after deducting 3½ cents a pound for its services. During the two months prior to the bank's insolvency the proceeds of the butter sold was received by the bank's receiver either actually or through the bank's correspondents, to whom drafts therefor had been sent for collection, and at no time had the bank's money on hand or credit with its collecting agents been reduced below the amount so received. Held, that the money so received, after deducting the bank's commission, belonged to the creamery patrons, and, being traced specifically into the hands of the bank's receiver, they were entitled to recover the same from him. *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128.

Complainants, who were engaged in business in Chicago, agreed to loan a sum of money to a third person on the security of certain sheep, the security to be taken by, and the money to be paid through, the defendant, which was a national bank located in Oregon, and which was authorized to draw on complainants for the money. Defendant took the notes and security from the borrower, and forwarded them to complainants, and also drew on them, through its Chicago correspondent, for the amount of the loan, crediting the amount of the drafts to complainants on its books. On the day on which the proceeds of one of such drafts was paid to the correspondent,

the defendant bank was closed by the comptroller, and placed in the hands of a receiver. Held, that the transaction was not one of banking, by which it was intended that the relation of debtor and creditor should be created either between the defendant and complainants or defendant and the borrower, but one in which defendant was merely the agent for both parties, which relationship was not changed by the fact that it was expected that the proceeds of the drafts would be mingled by defendant with its own funds, and that complainants were entitled to recover from the receiver as trust funds so much of the proceeds of the drafts as came into his hands. *Greer v. Dalles Nat. Bank*, 98 Fed. 681.

80. Recovery of deposits accepted with knowledge of bank's insolvency.—*Craigie v. Smith* (N. Y.), 14 Abb. N. C. 409, affirmed in 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; *Importers', etc., Bank v. Peters*, 51 Hun 640, 4 N. Y. 599, 21 N. Y. St. Rep. 98, affirming 1 N. Y. 89; Judgment affirmed in 123 N. Y. 272, 25 N. E. 319.

81. "The currency act provides for the appointment of a receiver to wind up the affairs of a national bank in the following cases: 1. For not keeping good a surplus—12th section. 2. For not keeping stock at minimum—15th section. 3. For not keeping good its reserve—31st section. 4. For not selecting a place for the redemption of its notes—32d section. 5. For holding its own stock over six months—35th section. 6. For nonpayment of its circulating notes—50th section. 7. For improperly certifying a check—section 1, Act March 3, 1869. 8. For failure to pay up capital stock, and for allowing same to become and remain impaired by losses—section 1, Act March 3, 1873. Under the happening of either of these contingencies the comptroller may appoint a receiver to take possession of all the books, records and assets of the corporation, who shall proceed to convert the assets into

point a receiver for an insolvent national bank,⁸² without a prior judicial determination of the necessity for such receiver.⁸³ The authority thus vested is not open to objection because vesting that officer with judicial power in violation of the constitution.⁸⁴ The right to put a national bank in voluntary liquidation, given to stockholders by Rev. St., § 5220, does not affect the right of the comptroller to appoint a receiver under the Act of June 30, 1876.⁸⁵ Nor does the provision of the Act of 1876, that, after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, limit the power of the comptroller to take action before the bank ceases to do a banking business.⁸⁶ The power vested in the comptroller of the currency by the Act of June 30, 1876 (19 Stat. 63), authorizing him, whenever he becomes satisfied of the insolvency of a national bank, to appoint a receiver, is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court.⁸⁷

money under the direction of a court of competent jurisdiction. And the money so realized shall be paid over to the treasury of the United States, subject to the order of the comptroller, who, after deducting in full whatever amount shall be due to the United States, shall distribute the balance ratably among the creditors of the bank; the claims of creditors to be proven before the comptroller, or adjudicated in a court of competent jurisdiction." In re Manufacturers' Nat. Bank, Fed. Cas. No. 9,051, 5 Biss. 499.

When the comptroller is satisfied of the default in redemption of the circulating notes of the bank, he may, under § 5234, Rev. Stat. U. S., throw the bank into liquidation and appoint a receiver. *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

82. Authority of comptroller to appoint receiver.—*United States*.—*Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168, 307; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216; *Bushnell v. Leland*, 164 U. S. 684, 41 L. Ed. 598, 17 S. Ct. 209; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385; *Price v. Abbott*, 17 Fed. 506; *Washington Nat. Bank v. Eckels*, 57 Fed. 870; *Snohomish v. Puget Sound Nat. Bank*, 81 Fed. 518; *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558; *Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301; *Wright v. Merchants' Nat. Bank*, Fed. Cas. No. 18,084, 1 Flip. 568; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

Florida.—*Camp v. First Nat. Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

Kansas.—*Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434.

83. Prior judicial determination as to necessity for receiver not required.—*Bushnell v. Leland*, 164 U. S. 684, 41 L. Ed. 598, 17 S. Ct. 209.

84. Authority of comptroller to appoint receiver not in violation of constitution.—*In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 C. Ct. 385; *Bushnell v. Leland*, 164 U. S. 684, 41 L. Ed. 598, 17 S. Ct. 209.

85. Authority not affected by statutes relating to voluntary liquidation or selection of agent by stockholders.—*Washington Nat. Bank v. Eckels*, 57 Fed. 870.

86. Washington Nat. Bank v. Eckels, 57 Fed. 870.

87. Conclusiveness of decision of comptroller as to insolvency.—*Washington Nat. Bank v. Eckels*, 57 Fed. 870.

The decision of the comptroller of the currency that the capital stock is impaired is conclusive on the stockholders of the bank and on the courts; the bank having no alternative but to make good the impairment or liquidate. *Thomas v. Gilbert*, 55 Ore. 14, 101 Pac. 393.

Conclusiveness of comptroller's action.—The debtors of a national bank, when sued by a person whom the comptroller, professing to act in pursuance of the fiftieth section of the National Currency Act, has appointed to be its receiver, can not inquire into the lawfulness of such receiver's ap-

Appointment Presumed to Be with Approval of Secretary of Treasury.—Appointments of receivers of national banks, made by the comptroller of the currency as provided by law, are to be presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of a department, within the meaning of § 2 of article 2 of the constitution of the United States, providing that congress may authorize the appointment of inferior officers by heads of departments.⁸⁸

Power to Appoint Receiver for Bank Which Has Gone into Voluntary Liquidation.—It has been doubted whether the comptroller of the currency has any authority to appoint a receiver for a bank which is in voluntary liquidation after the court has appointed a receiver and taken steps under a creditor's bill to enforce the stockholder's liability.⁸⁹

Removal.—The power vested in the comptroller to appoint a receiver for a national bank, carries with it the power of removal.⁹⁰

§ 287 (2ab) Appointment of Receiver by Court of Equity.—In General.—The power conferred by the Banking Act, upon the comptroller of the currency, to wind up the affairs of national banks, in certain contingencies, does not exclude the authority of a competent tribunal to appoint a receiver in other cases. In cases not within the special provisions of such act, a national bank may be proceeded against in the same manner as any other debtor or corporation; and, where the officers have been making preferential payments, a court of equity, on the application of a depositor, will appoint a receiver.⁹¹ While a state court has no power so far

pointment. *Cadle v. Baker* (U. S.), 20 Wall. 650, 22 L. Ed. 448.

A debtor of a national bank in the hands of a receiver can not question the authority of such receiver. *Jacobson v. Berry*, 135 Ill. App. 415.

88. **Appointment by comptroller presumed to be with approval of secretary of treasury.**—*Price v. Abbott*, 17 Fed. 506.

89. **Power to appoint receiver for bank in voluntary liquidation.**—*Harvey v. Lord*, 10 Fed. 236, 11 Biss. 144.

"The statute gives the comptroller authority to appoint a receiver in certain cases, and then in another section of the same statute provides expressly, where a bank has gone into voluntary liquidation and is in process of winding up its affairs, any creditor may enforce the liability of the stockholder by a creditor's bill; and if the comptroller had not acted and appointed a receiver for the purpose of enforcing the stockholders' liability, I have no doubt but what the action of the court supersedes the right of the comptroller to act in the premises, and gives the authority solely to the court

to enforce the individual liability of the stockholders. It can not, I think, be maintained that congress intended by the Act of June 30, 1876, to leave the comptroller any authority over the assets of a national bank which has gone into voluntary liquidation under § 5220, after a court of competent jurisdiction had, under a creditor's bill, appointed a receiver and taken possession of the assets, and initiated proceedings to enforce the liability of stockholders, because that would bring about a conflict between the officers of the court and those of the comptroller. The grant of power to enforce the liability of the stockholders is plenary and ample, and I see no need for any function of the comptroller when the affairs of the bank are once properly in the hands of the court." *Harvey v. Lord*, 10 Fed. 236, 11 Biss. 144.

90. **Power to remove.**—*Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476.

91. **Appointment of receiver by court of equity in cases not provided for by statute.**—*Irons v. Manufacturers' Nat. Bank*, Fed. Cas. No. 7,068, 6 Biss. 301;

as concerns such cause of action as are by act of Congress made the foundation of winding up proceedings to be brought under the authority of the United States, yet, for other causes of action Congress has left state courts free to grant relief by the appointment of a receiver at the instance of a stockholder whenever the general rules of equity may be deemed to call for it.⁹²

Wright v. Merchants' Nat. Bank, Fed. Cas. No. 18,084, 1 Flip. 569.

Under Rev. St. U. S., § 5241, providing that no national bank should be subject to visitorial powers other than such as are authorized by the act, or are vested in the courts of justice, which act also provided for the appointment by the comptroller of a receiver for such banks in certain cases, in any other case, for which the act does not authorize such appointment, a judgment creditor is entitled to have one appointed by a court of equity. *Wright v. Merchants' Nat. Bank*, Fed. Cas. No. 18,084, 1 Flip. 568.

Since the national banking law does not provide for the appointment of a receiver for a national bank by the comptroller, on its transferring its assets in fraud of its creditors, the courts have jurisdiction to appoint a receiver for such bank on the application of a judgment creditor. *Wright v. Merchants' Nat. Bank*, Fed. Cas. No. 18,084, 1 Flip. 568.

Under Act June 3, 1864, c. 106, 13 Stat. 99, authorizing the formation of national banks, a federal court in equity has jurisdiction to appoint a receiver to liquidate its obligations, and to authorize him to collect and enforce by action the liability of shareholders of the bank under § 12 of the act. Rev. St., § 5151 [U. S. Comp. St. 1901, p. 3435]. *King v. Pomeroy*, 58 C. C. A. 209, 121 Fed. 287.

92. Power of state courts to appoint receivers.—*Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574; *Merchants', etc., Nat. Bank v. Trustees*, 63 Ga. 549; *Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673.

Plaintiff sued both as a cestui que trust and as a stockholder of a national bank for the appointment of a receiver, on the ground that those who had gained control of it were using their power for improper purposes. It appeared that as a cestui que trust he was but one of many similarly situated in respect to a special trust fund, and for his general rights as a shareholder he could claim the assistance of the courts only because the cor-

poration was controlled by those acting in bad faith, and so could not or would not sue for its own protection. Held, that an objection that there was an adequate remedy at law is untenable. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

Rev. St. U. S., § 5242 [U. S. Comp. St. 1901, p. 3517], providing that no attachment, injunction, or execution shall issue against a bank or its property before final judgment in a suit, action, or proceeding in a state court, is not violated by appointing a permanent receiver on application of a stockholder, by a state court as part of the final judgment. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

A stockholder of a national bank whose charter has expired, suing also as cestui que trust of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating Rev. St. U. S., §§ 5141, 5191, 5201, 5205, 5208, 5234 [U. S. Comp. St. 1901, pp. 3462, 3486, 3494, 3495, 3497, 3507], and Act June 30, 1876, c. 156, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509]—relating to winding up proceedings in case of insolvency of such associations, and making special provision by means of a receiver appointed under authority of the United States. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

Where a judgment creditor of a national bank has had his execution returned nulla bona, the bank having gone into liquidation, and having no ostensible property on which levy may be made, he may enjoin the bank from disposing of its assets among its stockholders, and have a receiver appointed, though a bill has been filed in a federal court by the stockholders, praying for the appointment of a receiver. *Merchants', etc., Bank v. Masonic Hall*, 63 Ga. 549.

Where a national bank is insolvent, and in process of involuntary liquidation, and its affairs are being greatly mismanaged by its managing agents, to the injury of its creditors and stockholders, and some of the creditors and stockholders are being

Procedure to Obtain Appointment.—Where the officers of an insolvent bank are wasting its assets, and their gross mismanagement requires a receiver, such receiver may be appointed to take charge of its affairs on an ex parte application by a stockholder, though in general a receiver should be appointed only on notice.⁹³ It is not necessary for the appointment of a provisional receiver for an insolvent national bank that all the grounds therefor should be set out in detail in the petition, but it must show that the action is one in which a provisional receiver may be appointed.⁹⁴ In order that a receiver may be appointed for an insolvent national bank, the plaintiff must show that he has a claim against the bank, and that such claim will probably be lost or substantially impaired if a receiver is not appointed.⁹⁵

Presumption as to Regularity of Appointment of Receiver.—Where the records show that a receiver was appointed for an insolvent bank on the same day on which the action was commenced, it will be presumed that each act was done in its proper order, and that the action was begun before the appointment of the receiver.⁹⁶ That a receiver of an insolvent national bank

favorable to the injury of others, a receiver may be appointed at the instance of one of the stockholders not favored, and a provisional receiver may be appointed in such a case, even where the bank only has been made a defendant. *Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673.

Propriety of suit after expiration of bank's charter.—An objection that a national bank whose charter had expired had no corporate existence for the purpose of being sued by a stockholder and cestui que trust of a special trust fund for the appointment of a receiver is without merit, under Act July 12, 1882, c. 290, 22 Stat. 164, § 7 [U. S. Comp. St. 1901, p. 3459], extending their franchises, in such case "for the sole purpose of liquidating their affairs, until such affairs are finally closed." *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

The appointment of a temporary receiver, even if erroneous under Rev. St. U. S., § 5242 [U. S. Comp. St. 1901, p. 3517], providing that no attachment, injunction, or execution shall be issued against a national bank or its property before final judgment by any state court, is not cause for reversal in view of Gen. St. 1902, § 802, providing that causes shall not be reversed when errors "are immaterial, or such as have not injuriously affected appellant;" it appearing that the appointment was made to fill a vacancy by death of one appointed to the same position, to whose appointment appellant reserved no exception and acquiesced therein for about two months,

and the appointment was necessary to preserve funds already in the hands of the court. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

93. Appointment on ex parte application.—*Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673.

94. Requisites and sufficiency of petition.—*Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673.

An objection that the complaint in an equitable proceeding to appoint a receiver and to wind up the affairs of a bank fails to show effort by plaintiff, a stockholder, to get redress within the corporation by appeal to fellow stockholders or directors, can be raised only on a special demurrer. *Cogswell v. Second Nat. Bank*, 76 Conn. 252, 56 Atl. 574.

95. Elwood v. First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

96. Presumption as to regularity of appointment.—*Elwood v. First Nat. Bank*, 41 Kan. 475, 21 Pac. 673.

Election of agent to succeed receiver.—Express provision is made by the United States statutes for the election by the stockholders of a national banking association, of an agent to succeed the receiver appointed by the comptroller, under certain conditions. *Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854; *In re Chetwood*, 185 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385; *Barron v. McKinnon*, 179 Fed. 759.

27 Stat. 345, c. 360, § 3, authorizes the election of an agent by the stockholders of a national bank in the hands of a receiver when all indebtedness to outside creditors has been

has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, under 19 Stat. 63, as amended by 27 Stat. 345, to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the state courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States supreme court to review the judgment of the state supreme court in such actions.⁹⁷

§ 287 (2b) Effect of Appointment of Receiver.—The corporate existence of a national bank is not ended by its insolvency and the appointment of a receiver therefor,⁹⁸ but it is still capable of suing and being

paid, and provides that such agent, after giving bond, shall be vested with the control of the bank's affairs by the controller and receiver, being accountable to the circuit or district court of the United States. *Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854.

The shareholders' agent appointed under § 3 of the Act of June 30, 1876 (U. S. Comp. St. p. 3510), stands differently from a receiver. In order that the shareholders may elect an agent to administer the bank's affairs, it is necessary that the receiver should certify that the allowed claims of every creditor of the bank, not including the shareholders, who are creditors, have been paid. *Barron v. McKinnon*, 179 Fed. 759.

In order that the agent shall enter upon his duties, some of the shareholders must have executed a bond to pay all claims against the bank subsequently allowed. *Barron v. McKinnon*, 179 Fed. 759.

97. Effect of appointment.—In *re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

98. Corporate existence of bank not terminated by appointment of receiver.—*United States*.—*Bank v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439; *McElhenny v. First Nat. Bank*, Fed. Cas. No. 8,779.

Connecticut.—*National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

Florida.—*Camp v. First Nat. Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

Illinois.—*Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522, 41 N. E. 225, affirming 58 Ill. App. 256; *Wolf v. McNulta*, 178 Ill. 85, 52 N. E. 896, reversing 77 Ill. App. 325.

Nebraska.—*Teacumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811.

New York.—*Green v. Walkill Nat. Bank* (N. Y.), 7 Hun 63.

Ohio.—*Barnes v. Pogue*, 11 O. Dec. 798, 29 Wkly. L. Bull. 382.

By the terms of the statutes a national banking corporation continues, notwithstanding the appointment of a receiver, if its corporate life has not been extinguished by lapse of time, by any provision of its articles, by any action of its stockholders, or by any judgment of forfeiture. The receiver is indeed appointed to close up the association, that is to say, to wind up its business, get in its assets, and pay its debts, and, if need be, to enforce the personal liability of its shareholders for all its "contracts, debts, and engagements;" but the corporation lingers while this is being done, and on occasion when the receiver has discharged his duty with the satisfactory results enumerated and assets remain, an agent may be chosen, who may sue and be sued in the name of the association in the conduct of the final liquidation. Of course when insolvency is declared, the corporation is incapacitated from doing any new business. It has ceased to be a going concern, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished. No refinement of construction leads to any other result and numerous decisions preclude further discussion. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439.

"And in *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832, Mr. Chief Justice Waite, speaking for the court, referring to the assets and property of an insolvent national bank, remarked:

sued, notwithstanding a receiver has been appointed and is administering its affairs.⁹⁹ The appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets, of every description, of the association;¹ and from that moment the association is forbidden to pay any of its notes, discount any

'Such property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver. Its corporate capacity continues until its affairs are finally wound up and its assets distributed.'" *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439. See, also, *Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476; *Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564, 10 S. Ct. 238.

99. Capacity to sue or be sued.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439; *Camp v. First Nat. Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173; *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522, 41 N. E. 225, affirming 58 Ill. App. 256; *Green v. Walkill Nat. Bank* (N. Y.), 7 Hun 63.

The legal existence of a national bank is not ended by its insolvency and the appointment of a receiver therefor by the comptroller of the currency, but it still continues as an entity, capable of suing and being sued, notwithstanding such appointment; and where, under such circumstances, the legal title to a note, not an asset of the bank, is in its name, but the beneficial ownership in another, a suit upon such note may be maintained in its name to recover the money due thereon. *Camp v. First Nat. Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

The jurisdiction of the federal circuit court on a creditors' bill against a national bank, for discovery and other relief, upon allegations of fraud by the officers, is not superseded by the appointment of a receiver by the comptroller, under Rev. St., § 5234. *McElhenny v. First Nat. Bank*, Fed. Cas. No. 8,779.

The appointment of a receiver for a national bank by the comptroller, be-

cause of its failure to redeem its currency, is not such a dissolution of the corporation as will prevent a creditor from maintaining an action against it after the comptroller has disallowed his claim, particularly as the act of congress expressly provides for the causes of forfeiture and the proceedings to enforce it, the failure to redeem currency not being one of such causes. *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

A national bank which, when a receiver is appointed for it, is in arrears for rent under an existing lease, may be afterwards sued for damages caused by its failure to carry out the provisions of the lease. *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522, 41 N. E. 225, affirming 58 Ill. App. 256.

It is proper in a suit on a contract of a national bank, after a receiver has been appointed for it, to render judgment against the bank only, and enter an order requiring the receiver to certify the claim in judgment to the comptroller of the currency of the United States, to be paid by him in due course of administration of the assets of the bank. Judgment, *McKeon v. Wolf*, 77 Ill. App. 325, reversed. *Wolf v. McNulta*, 178 Ill. 85, 52 N. E. 896.

In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money, and taken as collateral security therefor the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors, and released them from all liability, where it does not also appear that plaintiffs had elected to proceed against the bank. *Barnes v. Pogue*, 11 O. Dec. 798, 29 Wkly. L. Bull. 382.

1. Appointment as superseding exercise of powers by directors.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840.

notes or bills, or otherwise prosecute the business of banking,² but the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist.³ The authority of its officers is not destroyed, but partially suspended; and the result of the proceedings may be that the corporation is dissolved, or its powers fully restored, and this will depend upon conditions as they may be developed, or may be brought about by prompt action on the part of those interested in the bank.⁴ It has been held, however, that a creditor of an insolvent national bank that is in the hands of a receiver can not sue to enforce, against officers and directors who have violated the banking laws, the personal liability imposed by Revised Statutes, § 5239, as such liability is an asset belonging equally to all creditors, and must be enforced by the receiver.⁵

§ 287 (3) Status, Powers and Duties of Receiver or Agent—§ 287 (3a) Receivers.—Status as Officer and Agent of the United States.—The receiver of an insolvent national bank, appointed by the comptroller of the currency, is neither an indorsee nor assignee for value.⁶ He is the agent of the United States, and not an agent or officer of any court;⁷ nor does he, by filing a petition in a federal court, under § 5234 of the United States Revised Statutes, for leave to sell property of the bank, or to sell or compound bad or doubtful debts, place the assets of the bank in the custody of the court, in the sense in which it has the custody of property in the hands of a receiver appointed by itself.⁸ The government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officials of the bank.⁹ He replaces them, stands exactly in their shoes, so far as the assets are concerned,¹⁰ and their knowledge necessarily becomes his knowledge.¹¹

2. **Payment of notes, discount of notes or bills, etc., forbidden.**—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840.

3. **Corporate franchise of association not dissolved.**—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Camp v. First Nat. Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439.

4. *Tecumseh Nat. Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811.

5. **Suits against officers to enforce personal liability imposed by Rev. Stat., § 5239.**—*Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488.

6. **Status of receiver.—Not an indorsee nor assignee for value.**—*People's State Bank v. Francis*, 8 N. Dak. 369, 79 N. W. 853; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

7. **Officer and agent of the United States and not of any court.**—*Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434; *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385; *Gibson v. Peters*, 150 U. S. 342, 37 L. Ed. 1104, 14 S. Ct. 134.

8. **Effect of petition to federal court for leave to sell bank's property, etc.**—*In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

9. **Receiver acts in lieu of officials of bank.**—*People's State Bank v. Francis*, 8 N. Dak. 369, 79 N. W. 853.

10. *People's State Bank v. Francis*, 8 N. Dak. 369, 79 N. W. 853.

In Case v. Terrell (U. S.), 11 Wall. 199, 20 L. Ed. 134, it was held that a receiver of a national bank represents the bank, its stockholders, and creditors, but that such officers do not in any sense represent the government.

11. **Knowledge of bank officials imputed to receiver.**—*People's State Bank*

Powers, Duties and Liabilities.—Upon the appointment and qualification of a receiver for a national bank, the assets of the bank pass into his possession as such receiver.¹² It is the duty of the receiver to collect the assets, but he does not distribute them.¹³ He acts under the control of

v. Francis, 8 N. Dak. 369, 79 N. W. 853.

Where a receiver is placed in charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of such assets. *People's State Bank v. Francis*, 8 N. Dak. 369, 79 N. W. 853.

12. Receiver custodian of bank's assets.—*Richardson v. Olivier*, 44 C. C. A. 468, 105 Fed. 277, 53 L. R. A. 113; *Corn Exch. Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635; *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148; *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687.

As stated in *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785, "no rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and can not be disturbed without the leave of the court; and * * * if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor." *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

He takes no greater rights in the property than the insolvent bank itself possessed. Hence it is not material, as respects his right to a fund to the bank's credit with another bank, which was claimed by a creditor, whether it was exclusively a cash indebtedness, or partly money or drafts in course of transmission or collection by that bank. *Fourth St. Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439.

The receiver takes the assets of the bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached. *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148.

A receiver of a national bank occupies a position analogous to that of a statutory assignee in insolvency, and

is not a bona fide holder for value of the assets of the bank. *Hade v. McVay, etc., Co.*, 31 O. St. 231; *Armstrong v. Warner*, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466, affirming 21 Wkly. L. Bull. 124, 10 O. Dec. 426.

Where stock of an Ohio corporation was lawfully owned by a national bank, but not registered in its name in the books of the corporation, a receiver of the bank, who, by virtue of his office, acquired control of the stock, is not, by reason of merely such control, a stockholder within § 5673, Rev. Stat. of Ohio, and is not authorized to petition under said section for a dissolution of the corporation. *Armstrong v. Herancourt Brewing Co.*, 11 O. Dec. 297, 26 Wkly. L. Bull. 39.

13. Duty to collect but not to distribute.—*Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200.

The statute then requires him to pay all moneys realized from the assets into the United States treasury, subject to comptroller's order, and this rule no order or proceeding in a state court can modify or control. *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146, 20 S. Ct. 915.

After which the receiver is not accountable therefor to any claimant thereof. *Hitz v. Jenks*, 123 U. S. 297, 31 L. Ed. 156, 8 S. Ct. 143.

Following misappropriated assets.—Where the members of a private banking firm were also controlling directors of a national bank, and had wrongfully converted large sums belonging to the bank to the use of the firm and its members and used same in the purchase of property for the firm and its members, and afterwards executed a general assignment thereof, with preferences for creditors, after the failure of the bank and the appointment of a receiver therefor, the receiver was entitled to a surrender of such of the property which it was found had "actually been purchased with the moneys of the bank as he elects to take, but of no other." In other words, the receiver is not entitled to a charge upon the entire mass of the estate, with priority over the

the comptroller of the currency and the moneys collected by him are paid over to the comptroller, who disburses them to the creditors of the insolvent

other creditors of the banking firm. *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

"Purchases made and paid for out of the general mass can not be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose." *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354. See *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693.

"The receiver could take 'such of the property hereinbefore set out and found to have been actually purchased with the moneys of the said bank as he elects to take; and by making said election and receiving such property the said receiver is not to be estopped from receiving the full benefit of the said deed of trust, or the provisions thereof, in favor of the Exchange National Bank.'" *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

But the directors as bankers having discounted notes and rediscounted them with the bank, the receiver can not, on that account lay claim to property, conveyed by the makers of the notes to the directors, as being purchased with the bank's money for the benefit of the firm of the directors. *Peters v. Bain*, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

Recovery of illegal dividend by receiver.—The receiver of a national bank can not recover a dividend paid, not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the profits, and when the bank, at the time such dividend was declared and paid, was not insolvent. *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

A national bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back. *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

Section 5204, Rev. Stat., makes the payment of a dividend out of capital illegal and ultra vires of the corpora-

tion, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer. The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." But a shareholder has not withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank which he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits. *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

"Under such circumstances we can not think that congress intended by the use of the expression 'withdraw or permit to be withdrawn, either in the form of dividends or otherwise,' any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the bona fide belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case." *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

"The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits." *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

Bank insolvent when dividend paid.—"In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it bona fide and for value. The assets of the bank

bank.¹⁴ However, the assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency, nor by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank.¹⁵ A receiver appointed by the comptroller to liquidate the affairs of an insolvent national bank, as such, is vested with all the rights of creditors and the rights of the corporation itself.¹⁶ He may doubtless challenge any wrongful acts

while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors." *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

"But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund." *McDonald v. Williams*, 174 U. S. 397, 43 L. Ed. 1022, 19 S. Ct. 743.

14. Disposition of moneys collected by receiver.—*In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

The receiver is practically the agent of the comptroller of the currency, who acts for the government. *Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

15. Effect of custody of assets by receiver or agent as bringing same under control of federal courts.—*Snohomish v. Puget Sound Nat. Bank*, 81 Fed. 518, following *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

"It is true as stated *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785, * * * 'no rule is better settled than that, when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and can not be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor.' But we do not regard these proceedings as falling within that rule.

* * * The receiver acts under the control of the comptroller of the currency, and the moneys collected by him are paid over to the comptroller who disburses them to the creditors of the insolvent bank." Per Fuller, C. J., in *In re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

16. Receiver vested with rights of creditors and of corporation.—*Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981. Decree affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

A receiver of a national bank, in all actions and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator. *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713.

The receiver does not represent the bank alone; he represents all the parties. He represents the law, which takes charge of the property for the benefit of all creditors, according to their respective and mutual rights. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

And where the bank would be estopped, the receiver is likewise estopped. *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 432, 33 L. Ed. 747, 10 S. Ct. 450.

"It may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee, or syndic, having the powers and occupying the relations which are sustained by a receiver under The National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a bona fide purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power can not well be doubted; and since a national bank

which creditors could challenge, and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain.¹⁷ He has authority, on sufficient consideration, to extend the time of payment of a debt owing such bank, where by so doing he can, in his judgment, strengthen the security he holds for the payment of such debt.¹⁸ He may, upon the order of a competent court, sell or compound all bad or doubtful debts of the bank and all the real and personal property on such terms as the court shall direct, but can not sell the property of the bank in the absence of such an order or upon terms in conflict therewith.¹⁹ Where a receiver, on taking possession of the assets of a national bank, finds its affairs in confusion and finds stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it is his duty to ascertain and assert fully the obligations and liabilities of the pledger to the bank and the

can not be put into bankruptcy, but can only be wound up under the peculiar provisions of the banking act, the receiver appointed by virtue thereof must have the same power, or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors." *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

A receiver of a national bank holds its negotiable notes subject to the same defenses that applied to the bank itself. *Hatch v. Johnson Loan, etc., Co.*, 79 Fed. 828.

17. Right to challenge wrongful acts, maintain suits against third parties, etc.—*Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981. Decree affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558; *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60.

18. Authority of receiver to extend time of payment of debt owing bank.—*People's State Bank v. Francis*, 8 N. Dak. 369, 79 N. W. 853.

19. Power to sell or compound debts, etc.—*Ellis v. Little*, 27 Kan. 707. 41 Am. Rep. 434; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200.

Under § 5234 of the U. S. Rev. Stats., when the receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure "the order of a court of record of competent jurisdiction," but the funds arising therefrom are disbursed by the comptroller, as in the instance of other col-

lections. In *re Chetwood*, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. 385.

The district court is "a court of record of competent jurisdiction," within Rev. St., § 5234, permitting a receiver of a national bank to compromise doubtful claims on the order of such a court. In *re Platt*, Fed. Cas. No. 11,211, 1 Ben. 534.

Under Rev. St., § 5234, which provides that the receiver, upon the winding up of the affairs of the bank, and upon the order of a court of competent jurisdiction, may compound "all bad or doubtful debts," when the claim is not bad or doubtful such order is invalid, and a composition made thereunder is ineffectual. *Price v. Yates*, Fed. Cas. No. 11,418.

Under Rev. St. U. S., § 5234, authorizing the receiver of a certain bank to compromise certain debts under order of the court, a composition by him of a debt, not included in those authorized, is not valid, though made under order of court. *Price v. Yates*, Fed. Cas. No. 11,418.

Without power to exchange, barter or trade assets.—The receiver of a national bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter, or trade the assets. *Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434.

Reopening compromise.—Where the receiver of a national bank compromised suits with counsel for the United States, the compromise will not be opened years afterwards, no fraud being alleged. *Henderson v. Myers (Pa.)*, 33 Leg. Int. 360, 11 Phila. 616.

purpose and extent of the pledge.²⁰ He may apply to a court of record of competent jurisdiction for an order to sell stocks and bonds in pledge in his hands, and it is not necessary for him to obtain formal authorization of the United States comptroller to make the application; nor is it essential that he should likewise have the formal authority of the comptroller to sell.²¹ The courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and can not order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Rev. St., § 5234, to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association.²² A receiver of a national bank appointed by the comptroller of the currency is limited in his functions by the object of the receivership, and the duties which it involves,²³ and persons dealing with him in his official capacity are chargeable with knowledge of his authority, and the estate of the bank can not be charged for the receiver's default or inability to perform contractors in excess of his authority.²⁴ A receiver of a national bank, appointed by the comptroller of the currency, is not vested, by virtue of his appointment, with all of those visitatorial powers over national banks which the United States, acting in its sovereign capacity, may exercise.²⁵ He is not, in virtue of his office as receiver, authorized to challenge or impeach an executed transaction between the bank and a third party that is simply ultra vires and which, though known to the United States, through its proper officials, at the time it is undertaken and consummated, was neither arrested nor complained of by the United States

20. Duties as to property pledged to bank.—*Wise v. Williams*, 162 Fed. 161.

21. Sale of pledged securities.—*Richardson v. Turner*, 52 La. Ann. 1613, 23 So. 158, affirmed in *Turner v. Richardson*, 180 U. S. 87, 45 L. Ed. 438, 21 S. Ct. 295.

22. In re Earle, 92 Fed. 22.

An instrument assigning certain shares of stock and bonds to the receiver of a national bank to secure a debt from the assignor to the bank, subject to certain prior pledges of a portion of the stock and bonds, in terms vested the receiver with "the rights of an owner, so far as regards sale, disposition, and management." Held, that dealings with the stock and bonds by the receiver after the assignor's death, with the approval of the controller, by which a forced sale was prevented by prior pledges, and all parties in interest were benefited, could not be attacked in equity by the assignor's administrator because he did not assent to the same. Decree, *Earle v. McCartney*, 112 Fed. 372, affirmed. *McCartney v. Earle*, 53 C. C. A. 392, 115 Fed. 462.

23. Limitation of functions to object of receivership.—*Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434.

24. Persons dealing with receiver charged with knowledge of his authority.—*Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434.

As the power of a receiver of a national bank appointed by the comptroller is restricted, a person dealing with him in his official capacity is bound as a matter of law to have knowledge of his authority to act, and if contracts and agreements are entered into with the receiver in excess of his authority as conferred by law, the parties contract at their own peril, and the estate of a bank can not be charged for the default or inability of a receiver acting outside of his functions as receiver and beyond the duties it involves. *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 29 S. W. 200.

25. Receiver not endowed with all visitatorial powers of government.—*Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981. Decree affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 538.

or any creditor or stockholder of the bank.²⁶ He can not charge the estate of the bank by his executory contract unless authorized to do so under the provisions of the National Banking Act and the order of a competent court of record obtained under the terms of that act.²⁷ A receiver of a national bank is not liable for damages sustained by a person on account of the fraud practiced upon him by the bank and its officers in inducing him to purchase stock.²⁸ A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all cost of collecting or attempting to collect the same, including an attorney's fee, can not be enforced beyond the allowance of statutory cost against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured.²⁹ The receiver of a national bank, who

26. Not authorized to challenge or impeach executed transactions, etc.—

Brown v. Schleier, 55 C. C. A. 475, 118 Fed. 981. Decree affirmed in 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, turned over to him in consideration of a release from all further liability under the lease; the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it. Decree, 55 C. C. A. 475, 118 Fed. 981, affirmed. *Brown v. Schleier*, 194 U. S. 18, 48 L. Ed. 857, 24 S. Ct. 558.

"There are some ultra vires acts, when committed by a national bank, which the government alone is permitted to call in question after such acts are committed. For example, in *National Bank v. Stewart*, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778, where such a bank had loaned money on the security of its own stock in admitted violation of § 5201, Rev. Stat. (U. S. Comp. St. 1901, p. 3494), the court decided, in substance, that, if any one 'except the government' could challenge the transaction, it could only be done before the contract was executed. In the well-known case of *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, it appeared that a national bank had loaned money on the security of real property in violation of § 5136, Rev. Stat. (U. S. Comp. St. 1901, p. 3456), and was proceeding to foreclose the mortgage, whereupon the mortgagor sought to enjoin the foreclosure proceedings upon the ground that the mortgage was a nullity, because the bank had no authority to ac-

cept it as security for a loan. It was held, however, that the act of making the loan on the security of real property, although ultra vires, did not render the mortgage void; that the mortgagor could not successfully resist the foreclosure proceedings because of the ultra vires character of the transaction; and that the United States alone could challenge it, doing so by a proceeding to oust the bank of its franchises. The court said that a private person could not directly or indirectly usurp this function of the government, but that it was the right of the government to determine whether it would complain of the transaction. The same rule was reaffirmed in *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213, and was followed and enforced by this court in *Sioux City Terminal R., etc., Co. v. Trust Co.*, 27 C. C. A. 73, 82 Fed. 124." *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981.

27. Power to charge bank by executing contract.—*Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434.

The receiver of a national bank gave a claim to an attorney, agreeing to give him one-half the proceeds, and directed him not to compromise without his consent. This contract was not authorized by any court, nor by the comptroller of the currency. Held, that the receiver had no authority to make the contract, and that the attorney could recover no part of a lot conveyed to the receiver in compromise of the claim. *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222, 14 S. W. 569.

28. Liability for damages for fraud practiced by bank and its officers.—*Lantry v. Wallace*, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878, affirming 38 C. C. A. 510, 97 Fed. 865.

29. Enforcement against receiver,

is not the "arm of a court," but the appointee of a federal officer, is subject to the general rule as to agents. That "in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have had that effect if proceeding from himself."³⁰

§ 287 (3b) Agent of Stockholders.—An agent elected by the stockholders of a national bank, takes the place of the receiver, and is at least a quasi public officer, the regularity and validity of whose appointment can not be questioned in a collateral proceeding.³¹ Such agent is no more an officer of the federal court than the receiver was.³² Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees.³³

§ 287 (4) Actions by or against Receiver or Agent—§ 287 (4a) Authority to Sue or Defend.—In General.—The receiver of an insolvent national bank is authorized to sue and defend actions for the purpose of collecting the assets, and for the adjudication of disputed claims against such bank.³⁴ The act of congress authorizing the comptroller of the currency to appoint a receiver to take charge of any national bank that has failed to redeem its circulating notes, and is in default, with full power to collect all debts due such bank or association, authorizes such receiver, when appointed, to sue for and stand in judgment in the courts of the country in all cases involving the collection of debts due such bank or association. The power to collect debts embraces the right to use all necessary means to attain that object.³⁵ Suits may be brought by the receiver of a national bank

of provisions of promissory note as to costs, etc.—*Citizens' Bank, etc., Co. v. Thornton*, 98 C. C. A. 478, 174 Fed. 752.

30. Subject to general rule as to agents.—*Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

The receiver of a national bank, like any one else, is bound by the acts of his agent, within the scope of the business with which he is intrusted, and that knowledge obtained by him while in the prosecution of such business was the knowledge of the receiver. *Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

31. Status of stockholder's agent.—*Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854.

32. Not an agent of federal court.—*In re Chetwood*, 165 U. S. 443, 41

L. Ed. 782, 17 S. Ct. 385. See ante, "Receivers," § 287 (3a).

33. Right to proceeds of suit by stockholder.—*Chetwood v. California Nat. Bank*, 113 Cal. 649, 45 Pac. 854.

34. Authority to sue or defend.—*Brown v. Tillinghast*, 84 Fed. 71.

35. Case v. Berwin, 22 La. Ann. 321.

The receiver of a national bank has the legal title to the property covered by his appointment, entitling him to maintain an action at law in his own name in the state courts. *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533.

Where a national bank, after or in contemplation of an act of insolvency, made a transfer of notes to a creditor as a preference, which was void under Rev. St., § 5242 (U. S. Comp. St. 1901, p. 3517), the receiver may at his election maintain an action at law against

at law or in equity, and he may sue in his own name or in the name of the association for his use.³⁶ A receiver, in order to sue for an ordinary debt due the bank, is not obliged to get an order of the comptroller of the currency. It is a part of his official duty to collect the assets.³⁷ Where a share-

the creditor for their conversion. *Ball v. German Bank*, 109 C. C. A. 498, 187 Fed. 750.

36. Power of receiver to sue at law or in equity, etc.—*Bank v. Pahquioque Bank* (U. S.), 14 Wall. 383, 20 L. Ed. 840; *Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551; *Lafayette Trust Co. v. Higginbotham*, 136 App. Div. 747, 121 N. Y. S. 489; *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 487, 32 N. E. 536.

In *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 487, 32 N. E. 356, it was held that "after the appointment of a receiver, he no doubt had the right to take possession of the assets of the bank, and collect the notes and other obligations due the bank. But a note payable to the bank might be sued on in the name of the bank, or in the name of the receiver, as he might elect." Quoted in *Lafayette Trust Co. v. Higginbotham*, 136 App. Div. 747, 121 N. Y. S. 489.

Rev. St., § 721, makes state law applicable as rules of decision in trials at common law, in the federal courts, only where it is not otherwise provided by federal enactment; and the right of a receiver of a national bank to bring a suit in his own name to recover an assessment laid on stockholders, for the purpose of paying debts, grows out of Rev. St., § 5234, and the state rules do not apply. *Stanton v. Wilkeson*, Fed. Cas. No. 13,299, 8 Ben. 357.

37. Order from comptroller of currency unnecessary.—*Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551; *Turner v. Richardson*, 180 U. S. 87, 45 L. Ed. 438, 21 S. Ct. 295.

Authorization by the comptroller is not necessary to entitle a receiver of a national bank to bring an action to establish a claim of the bank against an insolvent debtor, and for the sale of collateral held by the bank, since the provision of Rev. St. U. S., § 5234 [U. S. Comp. St. 1901, p. 3507], to the effect that the receiver shall be under the direction of the comptroller, means only that he shall be subject to such direction, and not that he shall be obliged to get special authority for every act that he does in collecting the assets and debts of the bank. *Judgment. Richardson v. Turner*, 52

La. Ann. 1613, 28 So. 158, affirmed. *Turner v. Richardson*, 180 U. S. 87, 45 L. Ed. 438, 21 S. Ct. 295.

A bill by the receiver of an insolvent national bank against the shareholders to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits may be brought without an express order from the comptroller of the currency. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60.

It need not be specifically averred that each and all of the several things had been done which were provided for in sections forty-six and forty-seven of The National Currency Act, in order to furnish the evidence to satisfy the comptroller that the bank had refused to pay its notes and was in default. *Cadle v. Baker* (U. S.), 20 Wall. 650, 22 L. Ed. 448.

In *Kennedy v. Gibson* (U. S.), 8 Wall. 498, 19 L. Ed. 476, the receiver had instituted a suit in equity against some of the stockholders of the bank for the purpose of charging them with the personal liability prescribed by the twelfth section of the act; and it was held that he had no right to do this without the comptroller's direction. But it will be perceived that that was a very special case, out of the ordinary course, and one which involved an important consideration of the policy to be pursued. Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled to all the surplus that remains, if any should remain, after the payment of the debts. They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted, and they ought not to be prosecuted without due regard to the circumstances of the case. The determination on the part of those charged with winding up the affairs of the bank, to resort to this ultimate remedy, requires the exercise of due consideration; and a receiver ought not to take it upon himself to decide so important a question without reference to the comptroller under whose direction he acts. Although it is his duty to collect the assets of the institution he does not distribute them, and can not ordinarily

holder's agent has been appointed to take charge of the assets of a national bank, such agent may sue and be sued in his own name or in the name of the association.³⁸

Power of Receiver to Move to Vacate Attachment.—In New York under the former practice giving the right to move to dissolve an attachment to a defendant only, the receiver of a national bank had no status in court which would justify him in making a motion to dissolve an attachment issued against the bank before his appointment, until he had obtained an order making him a party to the action.³⁹ Under the present New York code, however, extending the right to any person who, after the attachment issued, acquires an interest in or lien upon the property attached, the receiver appointed after issue of attachment may move by virtue of that relation, and need not be a party to the suit.⁴⁰ Where a foreign attachment is sued out against a national bank after its insolvency, and before final judgment, in violation of Rev. St. U. S., § 5242, the attachment will be quashed on a rule taken by the receiver of the bank.⁴¹ The debtors of a national bank, when sued by a person whom the comptroller, professing to act in pursuance of the fiftieth section of the National Currency Act, has appointed to be its

know, without reference to the comptroller, whether a prosecution of the stockholders will be necessary or not. Hence the decision in the case of *Kennedy v. Gibson* can not fairly be quoted for the government of a case like the present, which is a suit to recover an ordinary debt. *Bank v. Kennedy* (U. S.), 17 Wall. 19, 21 L. Ed. 551.

38. Authority of shareholder's agent to sue or defend.—*Barron v. McKinnon*, 179 Fed. 759.

Where a shareholder's agent has been appointed to take charge of the assets of a national bank under Act June 30, 1876, c. 156, § 3, 19 Stat. 63 (U. S. Comp. St. 1901, p. 3510), providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly instituted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. *Barron v. McKinnon*, 179 Fed. 759.

39. Power of receiver to move to vacate attachment issued before his appointment.—*Tracy v. First Nat. Bank*, 37 N. Y. 523; *Allen v. Scandinavian Nat. Bank* (N. Y.), 46 How. Prac. 71; *National Shoe, etc., Bank v. Mechanics' Nat. Bank*, 89 N. Y. 440.

Where an insolvent national bank of one state having funds on deposit in another is proceeded against in the latter state, and such funds are at-

tached, the receiver of such bank, not being a party to the action, can not move to set aside the attachment proceedings. *Allen v. Scandinavian Nat. Bank* (N. Y.), 46 How. Prac. 71.

40. *National Shoe, etc., Bank v. Mechanics' Nat. Bank*, 89 N. Y. 440; *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Key West Bldg., etc., Ass'n v. Bank*, 63 Hun 633, 18 N. Y. S. 390, 45 N. Y. St. Rep. 152; *Allen v. Bank*, 63 Hun 633, 18 N. Y. S. 391, 45 N. Y. St. Rep. 152.

A receiver of a national bank of another state, though not a party to an action in a New York court, has such a status that under Code, § 682, he may move to set aside attachment proceedings. *People's Bank v. Mechanics' Nat. Bank* (N. Y.), 62 How. Prac. 422.

The receiver of a bank, who acquired title to attached property prior to the attachment, can not move to vacate the same simply because, under such attachment against the bank, his property was seized; Code Civ. Proc., § 682, allowing only those whose interests are acquired subsequent to the attachment to so move. *Key West Bldg., etc., Ass'n v. Bank*, 63 Hun 633, 18 N. Y. S. 390, 45 N. Y. St. Rep. 152; *Allen v. Bank*, 63 Hun 633, 18 N. Y. S. 391, 45 N. Y. St. Rep. 152.

41. Quashal of foreign attachment sued out in violation of United States Rev. Stats., § 5242.—*Commerce Bank v. City Nat. Bank* (Pa.), 12 Phila. 189.

receiver, can not inquire into the lawfulness of such receiver's appointment.⁴²

Substitution of Agent in Suit Commenced by Receiver.—When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of congress in that behalf, it is proper practice to substitute, on motion, the "agent" as the plaintiff on the record in place of the "receiver," in a suit already commenced by the latter.⁴³

Laches as Affecting Right to Sue Receiver.—Where a secured creditor of an insolvent national bank claims dividends on the whole amount of the debt, without regard to his collaterals, but is required by the comptroller to first exhaust the collaterals, and then prove for the balance, and the creditor accordingly pursues this course, and receives dividends on such balance, a delay of two years in suing the receiver to recover dividends on the whole amount of the debt, is not such as to raise a presumption of laches, or create an estoppel, no other creditor having been harmed by the temporary submission to the comptroller's ruling.⁴⁴ A suit by a depositor in a bank against its receiver to recover the proceeds of a check fraudulently received by the officers of the bank after its insolvency, and which came into the hands of the receiver, commenced within three years after the insolvency, is not barred by laches, in the absence of a statute of limitations which would bar an action at law of like character, where no injury to any one has resulted from the delay, which was due solely to a misunderstanding of his rights by complainant, caused in part, at least, by statements made to him by the receiver.⁴⁵

§ 287 (4b) Jurisdiction.—Equity Jurisdiction.—Equity has jurisdiction of a bill by a receiver of a national bank to set aside a transfer of notes made by the bank to prefer a creditor.⁴⁶ Where the controversy in-

42. Debtors of bank can not question lawfulness of receiver's appointment.—*Cadle v. Baker* (U. S.). 20 Wall. 650, 22 L. Ed. 448.

Under the act of congress for the organization of national banks, it is the province of the comptroller of the currency to determine whether the emergency which authorizes the appointment of a receiver for a bank has risen or not. And whenever he determines that the emergency has arisen, and appoints a receiver accordingly, his determination is conclusive upon the debtors of the bank, though it may not be so upon the bank itself. *Platt v. Crawford* (N. Y.), 8 Abb. Prac., N. S., 297.

A certificate of the comptroller of the currency, approved and concurred in by the secretary of the treasury, reciting the existence of all the facts of which the former is required by The National Currency Act (13 Stat. 99,

§ 50) to be satisfied, to authorize him to appoint a receiver of a national bank, under the provisions of that act, is sufficient evidence of the validity of the appointment of the receiver in an action brought by him as such. *Platt v. Beebe*, 57 N. Y. 339.

43. Substitution of agent in suit commenced by receiver.—*McConville v. Gilmour*, 36 Fed. 277, 1 L. R. A. 498.

44. Delay held not an estoppel to sue receiver for dividends.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360, affirming decrees, 21 C. C. A. 282, 75 Fed. 148, 24 C. C. A. 663, 78 Fed. 298.

45. Richardson v. Olivier, 44 C. C. A. 468, 105 Fed. 277, 53 L. R. A. 113.

46. Equity jurisdiction of bill to set aside preferential transfer.—*Alabama, etc., R. Co. v. Austin*, 36 C. C. A. 536, 94 Fed. 897.

volves the question on what basis dividends in insolvency should have been declared, and therein the enforcement of the trust in accordance with law, there is no doubt of the jurisdiction in equity to compel the allowance of dividends by the receiver of a national bank upon a proper basis.⁴⁷

Receiver Subject to Laws of State in Whose Court He Sues.—A receiver of a national bank coming into a state court to enforce a mortgage executed to him to secure a pre-existing indebtedness to the bank, although he is practically the agent of the comptroller of the currency, who acts for the government, is subject to the laws of the state relating to mortgages executed in fraud of creditors.⁴⁸

Removal of Causes.—A receiver of a national bank being entitled to remove actions against him to the federal courts as an action arising under the laws of the United States, as provided by U. S. Comp. St. 1901, p. 503, § 629, a defendant, when sued in a state court by such receiver, is also entitled to exercise the same right.⁴⁹

§ 287 (4c) Parties.—Parties Defendant in General.—An action to establish the validity of a claim against an insolvent bank may be brought in a court of competent jurisdiction against both the insolvent bank and the receiver, or against the insolvent bank or the receiver.⁵⁰ If an action to establish the validity of a claim against an insolvent bank is brought against the receiver either jointly with the insolvent bank, or against him only, he may be directed by the judgment in the action to recognize the claim, and to provide for its payment along with the other claims against the bank.⁵¹ If such action be brought against the insolvent bank only, it is binding upon the re-

47. Jurisdiction of equity to compel allowance of dividends by receiver.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360, affirming decrees 21 C. C. A. 282, 75 Fed. 148, 24 C. C. A. 663, 78 Fed. 298.

48. Receiver bound by laws of state in whose court he sues.—*Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

"It is true that the receiver is practically the agent of the comptroller of the currency, who acts for the government; but this would not exempt him from the operation of the laws of Texas when he comes into her courts to ask that rights be enforced under a mortgage, which, if the contentions of appellees be well founded, is, under such laws, fraudulent and void." *Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

49. Removal of causes.—*Johnson v. Rankin* (Tex. Civ. App.), 95 S. W. 665.

50. Propriety of action against bank and receiver, or against either.—*Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

Under the Act of Congress of June 3, 1864, entitled "An act to provide a

national currency," and providing for the appointment of a receiver in case of the failure of a bank, the receiver is a proper party defendant in proceedings for the adjudications of claims against the bank. *Turner v. First Nat. Bank*, 26 Iowa 562.

In an action against a national bank for which a receiver had been appointed, by a creditor, to establish his claim, which had been rejected by the receiver, the latter is properly made a party. *Green v. Walkill Nat. Bank* (N. Y.), 7 Hun 63.

The appointment of a receiver under the National Bank Act does not absolutely dissolve the corporation; and, in an action to establish the claim of a creditor which has been rejected either by the United States comptroller of the currency or the receiver, the bank and the receiver may both be made parties defendant. *Green v. Walkill Nat. Bank* (N. Y.), 7 Hun 63.

51. Judgment in action to establish claim brought against receiver jointly with bank or against receiver alone.—*Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

ceiver, unless void by reason of fraud or collusion.⁵² The contract is analogous to that of a suit brought against a debtor for the recovery of a debt, after a general assignment of his property made to a trustee for the benefit of creditors.⁵³ The contract between the debtor and creditor would still subsist, and could be enforced by suit against the debtor, and a judgment between the original parties on the contract would necessarily establish the existence and extent of the obligation between them, as well as against a trustee of his estate for the benefit of creditors.⁵⁴ In an action to secure the application of part of the funds in the hands of a receiver of a national bank, appointment by the comptroller of the currency, in satisfaction of plaintiff's claim against the insolvent bank for money received by it as collecting agent, the bank is only a nominal party, for the receiver is the one to be held accountable for any unauthorized disposition of the money sued for.⁵⁵ The comptroller of the currency and the treasurer of the United States are not necessary parties defendant in an action against the receiver of an insolvent national bank to recover an assessment made by the comptroller, but paid by the plaintiff under an erroneous belief that he was a stockholder.⁵⁶

Substitution of Receiver as Defendant in Place of Bank.—A receiver of a national bank, appointed after the commencement of an action against the bank, to recover on a cashier's check issued by it, is entitled to be substituted absolutely as defendant in the place of the bank, and it is error to refuse such substitution, and merely make him an additional party defendant.⁵⁷

§ 287 (4d) Conduct of Suits.—A receiver of a national bank is an officer and agent of the United States within the meaning of § 380 of the Revised Statutes of the United States, providing that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.⁵⁸

§ 287 (4e) Pleading.—Showing as to Grounds for Equitable Relief.—In a suit by a receiver of a national bank to establish a lien in favor

^{52.} *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

^{53.} *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

^{54.} *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

"That was evidently the view taken by the supreme court of The National Banking Act in *National Pahquioque Bank v. First Nat. Bank*, 36 Conn. 323, 4 Am. Rep. 80, where it is said: 'Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction as a means of establishing

their validity.'" *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

^{55.} *Grant v. Spokane Nat. Bank*, 47 Fed. 673.

^{56.} **Comptroller and treasurer of United States not necessary parties defendant in action against receiver.**—*Brown v. Tillinghast*, 84 Fed. 71.

^{57.} **Substitution of receiver as defendant in place of bank.**—*Sioux Falls Nat. Bank v. First Nat. Bank*, 6 Dak. 113, 50 N. W. 829.

^{58.} **Conduct of suits by district attorneys.**—*Gibson v. Peters*, 150 U. S. 342, 37 L. Ed. 1104, 14 S. Ct. 134.

of the bank, the usual rule applies that the bill must show sufficient grounds for equitable relief.⁵⁹

Joinder of Counts.—In an action by the receiver of an insolvent national bank to recover back an unlawful reference, the first count, which seeks to recover back the money deposited as an unlawful payment made in contemplation of insolvency, is not inconsistent with the second count, which seeks to recover on the certificate of deposit as a valid instrument.⁶⁰

Effect of Want of Interest in Subject Matter.—A bill in equity was brought by an alleged assignee from a national bank of bonds deposited with the treasurer of the United States to secure its circulating notes, against the treasurer and the comptroller and a receiver of the bank, praying for a decree establishing complainant's title, and requiring the treasurer and comptroller to pay over the surplus of such bonds to complainant. Held, that a demurrer should be allowed (per Woodruff, J.), because the court had no jurisdiction to grant the relief asked in respect to the treasurer and comptroller, and because the receiver had no concern in the subject-matter.⁶¹

Allegation of Appointment.—In an action by the receiver of a national bank against a debtor of the bank, an allegation that on a day named the comptroller of the currency appointed the plaintiff receiver of the bank in accordance with the provisions of the act of congress, and the plaintiff has taken possession of the assets, including the demand in suit, is a sufficient allegation of appointment.⁶²

Set-Off of Deposit against Claim of Bank.—See ante, "Right of Debtor to Set Off Claim against Bank," § 286 (3).

§ 287 (4f) Proof.—In General.—In suits by and against receivers of insolvent national banks, the usual rules of procedure apply, that the allegations and proofs must agree that the court can consider only what is put in issue by the pleadings, and that averments without proofs and proofs without averments are alike unavailing.⁶³ The complainant must prove the essentials of his bill of complaint.⁶⁴

Proof of Insolvency.—The decision of the comptroller of the currency,

59. Showing as to grounds for equitable relief.—A bill by a receiver of a national bank to establish a lien in favor of the bank on a note which the bank held for collection and which the depositor, who was financially irresponsible, had assigned to a third party, examined, and held to show sufficient grounds for equitable relief. *Gibbons v. Hecox*, 105 Mich. 509, 63 N. W. 519, 55 Am. St. Rep. 463.

60. Consistency of counts.—*National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

61. Bill demurrable where receiver without interest in subject matter.—*Van Antwerp v. Hulburd*, Fed. Cas. No. 16,827, 8 Blatchf. 282.

62. Sufficient allegation of appointment of receiver.—*Platt v. Crawford* (N. Y.), 8 Abb. Prac., N. S., 297.

63. Application of usual rules as to correspondence of allegations and proof, etc.—*Alabama, etc., R. Co. v. Austin*, 36 C. C. A. 536, 94 Fed. 397.

64. Insufficient proof to sustain bill to set aside preferential transfer.—A bill by the receiver of a bank to set aside a preferential transfer of notes, in violation of Rev. St., § 5242, is not sustained by proof that the notes were put into the transferee's hands for payment by him, and that, instead of paying them, he wrongfully kept them. *Alabama, etc., R. Co. v. Austin*, 36 C. C. A. 536, 94 Fed. 397.

that a national bank has become insolvent, is conclusive upon the question of insolvency, for the purpose of conferring upon the receiver authority to sue, but it is not evidence of the fact of insolvency in an action by the receiver against the stockholders for contribution, under Rev. Stat., § 5151, but other evidence of that fact must be given.⁶⁵

Burden of Proof in Action against Receiver to Recover Amount of Collection as Trust Fund.—In an action against a receiver of a national bank to recover as a trust fund the amount of a draft collected by the bank, the burden of the proof is on the owner of the draft to trace its proceeds into the common assets.⁶⁶

Burden of Proof in Action to Recover Deposit.—Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, the burden of proof was on the receiver to show that the purchase of stock was actually made.⁶⁷ The fact that the depositor proved his deposit account before the receiver, without including the part sued for, did not estop him from denying that he subscribed for the stock.⁶⁸

§ 287 (4g) Province of Court and Jury.—In actions by or against receivers of national banks the usual rules governing the province of court and jury apply. Thus, where the evidence on material points in the case is conflicting the question presented is one of fact for the jury and, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them the case is properly left to the jury.⁶⁹ So,

65. **Proof of insolvency.**—Bowden v. Morris, Fed. Cas. No. 1,715, 1 Hughes 378.

66. **Burden of proof to trace proceeds of collections into assets in hands of receiver.**—American Can Co. v. Williams, 176 Fed. 816, judgment affirmed in 178 Fed. 420, 101 C. C. A. 634.

67. **Burden of proof to show purchase of stock with part of deposit.**—Somerset Nat. Banking Co. v. Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

68. **Somerset Nat. Banking Co. v. Adams**, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

69. **Province of jury to determine controverted questions of fact.**—Emmerling v. First Nat. Bank, 38 C. C. A. 399, 97 Fed. 739.

Plaintiff sued the receiver of a national bank for money loaned the bank for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively that plaintiff contracted for the loan with the bank

cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not receipted for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the comptroller and to defendant, written after the bank's insolvency, plaintiff, who was unexperienced in business matters, referred to herself as a stockholder. Held, that the evidence did not estop plaintiff from showing that she was not a stockholder, and that that issue was properly submitted to the jury. *American Nat. Bank v. Williams*, 42 C. C. A. 101, 101 Fed. 943.

In a suit against a national bank and its receiver to recover the value of securities claimed by plaintiff to have been held by the bank as her agent, it appeared that plaintiff, a German

also, in such actions the general rule applies that the direction of a verdict for a defendant is proper if, considering all of the evidence and the inferences which might naturally and logically be drawn therefrom, it is not sufficient to sustain a verdict in favor of the plaintiff, and the court in the exercise of a sound judicial discretion would feel impelled to set aside such a verdict if returned.⁷⁰ On the other hand, it has been held that in an action by a receiver to set aside a preference a verdict may be directed for plaintiff where the intent to prefer is plain.⁷¹

woman sixty years old, and with little knowledge of business, had caused the securities to be delivered to the bank, whose cashier receipted for them to her agent, under a verbal agreement with the president that they should be collected when due, and the proceeds kept reinvested by the bank for plaintiff, for five years; that, after obtaining the securities, the bank notified plaintiff that it was necessary for her to indorse them, and that she had her brother come for that purpose. The question at issue was whether at that time the bank redelivered the securities to plaintiff, and she turned them over to the president as an individual, on which there was conflict of testimony. The securities were assigned by plaintiff as directed by the cashier, the assignments, so far as appeared, being in blank as to the assignee. The receipt then given plaintiff was on the letter head of the bank, but purported to be made by the president individually. Plaintiff and her brother testified that such receipt was handed to plaintiff in an envelope, and was at once sealed by the brother, and taken for safe-keeping, without being read, and that nothing was said about any change in the previous verbal agreement. The subsequent correspondence was conducted entirely between plaintiff and the bank through its cashier. On her request, he from time to time remitted her money from interest collected, sent her statements of the taxes paid for her by the bank, and one renewal note, subsequently taken, and sent to plaintiff, was made payable to and indorsed by the bank. Held, that the question whether there was an actual redelivery of the securities and change of depositary was one of fact for the jury, since the receipt was not conclusive on plaintiff, but, if it was not read to her, and she was induced to accept it in the belief that it was the receipt of the bank, her rights against the bank were not prejudiced thereby. *Emmerling v. First Nat.*

Bank, 38 C. C. A. 399, 97 Fed. 739.

On the issue whether a defendant delivered collateral security to M. as president of the L. Bank, or for his private use, full instructions were given to the jury as to M.'s authority to receive it for the bank, after which the question was put to them, "Did the defendant deliver the security to the L. Bank?" no objection being made to its form, and the jury answered the question in the negative. Held, that the special finding of the jury rendered the instructions immaterial, and that they must have understood the finding to mean that the security was not delivered to M. for the bank. *Corcoran v. Batchelder*, 147 Mass. 541, 18 N. E. 420.

70. When direction of verdict for defendant proper.—*Swords v. Page*, 98 C. C. A. 528, 174 Fed. 916.

71. Directing verdict for plaintiff.—Where, from the facts proved, the intent to prefer, on the part of the bank, was a necessary conclusion, it was correct in the district court to direct a verdict for the plaintiff. If any other verdict, on the facts proved, had been rendered, it would have been the duty of that court to set it aside. *National Security Bank v. Butler*, 129 U. S. 223, 32 L. Ed. 682, 9 S. Ct. 281.

In an action by the receiver of an insolvent national bank against a former stockholder and director to recover the price he received for shares of stock which it was alleged he sold to the cashier and received payment from funds of the bank, evidence considered, and held insufficient to charge defendant with notice either that the stock was bought by the cashier or paid for with funds of the bank, if such was the fact; it appearing that he delivered the stock on a contract signed by the cashier as agent for another director, and that the greater part was paid for by such director to whom it was transferred, and who received dividends thereon. *Swords v. Page*, 98 C. C. A. 528, 174 Fed. 916.

§ 287 (4h) Judgment.—Form.—Where judgment is rendered against a receiver in a damage action against the bank, its form should be that the receiver pay the claim or certify it to the comptroller for payment.⁷²

Decree.—In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the comptroller of the currency, but should direct that the claim of the creditor, as established, be certified to the comptroller, to be paid in due course of administration.⁷³ A decree which commands the receiver of an insolvent national bank to pay over a large sum of money within ten days, where, as a matter of fact, and in accordance with law, the funds are in the custody of the comptroller of the currency, unduly limits the time for satisfying the decree, and might result in the receiver being in contempt for not paying over moneys which are not within his control.⁷⁴

Amount of Recovery—Recovery of Interest.—In a suit against the receiver of a national bank for money loaned to the bank while it was a going concern, it is error to permit plaintiff to recover interest on the loan after the bank's suspension and the appointment of a receiver,⁷⁵ since debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes, and the amount of all debts computed as of that day.⁷⁶

Modification of Judgment.—Where, in a judgment against the receiver of a national bank, interest on the claim has been erroneously allowed, and the amount of such erroneous interest can be determined by the court of appeals by a mathematical competition, the judgment of the trial court will be cancelled and annulled as to the amount of such interest, and affirmed as to the balance.⁷⁷

Conclusiveness on Receiver of Judgment against Bank.—While the receiver of an insolvent national bank may interpose and become a party to a suit to enforce a claim against the bank, he is not a necessary party to such a suit, and a judgment rendered against the bank by a court of competent jurisdiction, in a suit to which he is not a party, is binding upon the receiver in the absence of fraud or collusion.⁷⁸

§ 287 (4i) Costs.—Where, upon a creditors' bill against a national

72. *Case v. Citizens' Bank*, 100 U. S. 446, 25 L. Ed. 695.

73. **Form of decree in suit against receiver.**—*Merrill v. First Nat. Bank*, 21 C. C. A. 282, 75 Fed. 148, affirmed in *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360.

74. *Richardson v. Louisville Banking Co.*, 36 C. C. A. 307, 94 Fed. 442.

75. **Recovery of interest on loan after bank's suspension and appointment of receiver.**—*American Nat. Bank v. Wil-*

liams, 42 C. C. A. 101, 101 Fed. 943; *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

76. *American Nat. Bank v. Williams*, 42 C. C. A. 101, 101 Fed. 943.

77. **Modification and affirmation of judgment.**—*American Nat. Bank v. Williams*, 42 C. C. A. 101, 101 Fed. 943.

78. **Conclusiveness on receiver of judgment against bank.**—*Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189.

bank, the court has appointed a master to investigate the affairs of the bank, and subsequently a receiver is appointed by the comptroller of the currency, such receiver will be ordered to pay the master's costs, where the services of the latter have been beneficial to the bank.⁷⁹ Where proceedings against stockholders to ascertain the indebtedness of the bank and the amount of assessments to be made are being prosecuted by one creditor as representative of all, and the stockholders appeal from a decree against them, which decree is reversed, with costs, the costs of the appeal will be deducted before any dividend will be declared.⁸⁰

§ 288. Presentation, Allowance, and Payment of Claims—§ 288

(1) In General.—Where a national bank, organized under the United States National Banking Act, becomes insolvent, and is placed in the hands of a receiver, pursuant to the provisions of such act, the rights and liabilities of its debtors and creditors become fixed at the appointment of the receiver, and thereupon its property is subject, after prior government claims, if any, to disposal and ratable distribution, upon principles of equity among all its general creditors.⁸¹ The comptroller is required by the provisions of the banking act to make, from time to time, a ratable dividend of the money paid over to him by the receiver, on all such claims as may have been proved to his satisfaction or adjudication in a court of competent jurisdiction, and, as the proceeds of the assets of the association are paid over to him, he shall make further dividends on all claims previously allowed or adjudicated.⁸²

§ 288 (2) Allowance or Rejection by Comptroller.—If the comptroller is satisfied with the proof which is furnished to him, he can allow the claim, and when the allowance is made, the creditor becomes entitled at once to participate in all dividends that may be declared.⁸³ If the comptroller declines to recognize the claim as valid it must be established by the adjudication of some competent court before it can share in the distribution of assets.⁸⁴ When adjudicated in favor of the creditor, it is established as a claim against the bank, and must be treated accordingly by the comp-

79. Payments of master's costs by receiver.—*McElhenny v. First Nat. Bank*, Fed. Cas. No. 8,779.

80. Deduction of costs of appeal.—*Irons v. Manufacturers' Nat. Bank*, 36 Fed. 843.

81. Property of insolvent bank to be ratably distributed.—*Balch v. Wilson*, 25 Minn. 299, 33 Am. Rep. 467.

82. Provision of United States Revised Stats., § 5236.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

83. Allowance of claim and effect thereof.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

The claims of depositors in a national bank at the time of its suspension, for the amount of their deposits,

are, when proved to the satisfaction of the comptroller of the currency, placed upon the same footing as if they were reduced to judgments. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176.

84. Necessity for adjudication by court in case of rejection of claim by comptroller.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

The presentation of a claim against a national bank in the hands of a receiver, and the disallowance of the claim by the receiver, is not conclusive in respect to the validity of the claim, and is no bar to an action at law by the creditors. *National Pahquoque Bank v. First Nat. Bank*, 36 Conn. 325, 4 Am. Rep. 80.

troller.⁸⁵ One who presents several different claims against an insolvent national bank is not, by taking dividends on the claim allowed by the comptroller of the currency, estopped to sue the bank on the disputed claims, ordered by the comptroller to be thrown out of consideration, to be settled elsewhere.⁸⁶

Effect of Presenting Claim as General One upon Right to Subsequently Claim Preference.—There is nothing in the National Banking Act that would debar the creditor of an insolvent bank holding a claim entitled to preferred payment from asserting his preference after presenting his claim as a general one.⁸⁷

§ 288 (3) Claims Provable.—As has been already seen, the business of a national bank must stop when its insolvency is declared.⁸⁸ No new debt can be made after that.⁸⁹ It follows from this that the only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown, by proof satisfactory to him or by the adjudication of a competent court, to have had their origin in something done before the insolvency.⁹⁰

85. Effect of adjudication in favor of creditor.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

86. Effect of accepting dividend on allowed claims upon right to sue on those rejected.—*Chemical Nat. Bank v. World's Columbian Exhibition*, 170 Ill. 82, 48 N. E. 331, affirming 67 Ill. App. 169.

87. Right to assert preference after presenting claim as a general one.—*Hunt v. Smart*, 8 Tex. Civ. App. 425, 28 S. W. 63.

Complainant was a depositor in a national bank, and on the day the bank closed its doors, and when it was known by its officers to be insolvent, he deposited a check. On the statement of the receiver that the proceeds of the check had gone into the general funds of the bank, he included the amount of the check in the proof of his claim in the insolvency proceedings, and received partial dividends on such claim. In fact, the check was collected by the bank examiner after the suspension, and the proceeds went into the hands of the receiver. Held, that the action of complainant in including the amount of the check in his claim under such circumstances did not amount to an election of a remedy, or create an equitable estoppel which precluded him, on learning the facts, from maintaining a suit against the receiver to recover the proceeds of the check as his property, on tendering back the dividends received thereon, before the closing of the estate in insolvency, and

while the money was still in the receiver's hands. *Richardson v. Olivier*, 44 C. C. A. 468, 105 Fed. 277, 53 L. R. A. 113.

88. Termination of business of bank by insolvency United States Rev. Stats., § 5228.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686. See ante, "Insolvency and Its Effect in General," § 285.

89. White v. Knox, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

90. Claims provable.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686; *Merchants' Nat. Bank v. School Dist. No. 8*, 36 C. C. A. 432, 94 Fed. 705.

Claims provable.—A claim for rent which was due nine days before the suspension of the bank is an existing demand which is entitled to be proven up for participation in the distribution of the assets. *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 S. Ct. 439.

Under § 50 of the Act of Congress of June 3, 1864, entitled "An act to provide a national currency," and which provides for the appointment of a receiver on the failure of a bank, and a collection of its assets, and that a dividend shall be declared "on all claims" against the bank, the claim of a person who has left with the bank United States bonds on special deposit, and for safe-keeping, is a debt against the bank, within the meaning of the act. *Turner v. First Nat. Bank*, 26 Iowa 562.

§ 288 (4) Basis of Distribution of Assets.—From what has been stated as to the nature of claims which may be recognized by the comptroller, it is clearly his duty, in paying dividends, to take the value of the claim at the date of the insolvency as the basis of distribution,⁹¹ and not the amount of a judgment for a contested claim, including interest to date.⁹²

91. Dividends based on amount of claim at date of insolvency.—*White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686; *American Nat. Bank v. Williams*, 42 C. C. A. 101, 101 Fed. 943; *Merchants' Nat. Bank v. School Dist. No. 8*, 36 C. C. A. 432, 94 Fed. 705.

"In *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561, it was ruled that the statute furnishes a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved and was not decided, but the case is in harmony with *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687; and *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148, which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by § 5242, are preserved; and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686." *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360.

92. Interest excluded from judgment on contested claim.—A creditor of an insolvent national bank, whose debt had been disallowed by the comptroller, brought suit to have his claim adjudicated, and recovered a judgment against the bank for the amount of his claim with interest added to the date of the judgment. Between the time of the failure of the bank and the judgment, the comptroller had paid to the other creditors, under the requirements of § 5236, Rev. Stat., ratable div-

idends, amounting in the aggregate to sixty-five per cent on the amounts due them respectively, as of the date when the bank failed. As soon as this claim was adjudicated, the comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent on that amount. This was correct, although the creditor claimed that the dividend should be paid on the face of the judgment. *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

The comptroller decided that the payment should be on the basis of the amount due him on his adjudicated claim as of the date of the failure of the bank, because the dividends to the other creditors had been calculated in that way, and all he was entitled to was a share in the proceeds of the assets equal to what had been distributed to others during the pendency of his litigation, and in this the comptroller was right. Dividends are to be paid to all creditors ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment. *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

"If interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratably as the law requires." *White v. Knox*, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686.

"It is his function, by and under the direction of the comptroller, to disburse the fund according to law. In the matter of the allowance or disallowance of claims he must exercise his judgment. If he make an erroneous decision, the law does not contemplate that the other creditors shall suffer thereof." *Merchants' Nat. Bank v. School Dist. No. 8*, 36 C. C. A. 432, 94 Fed. 705.

Creditors of a national bank in liquidation, who received, as collateral,

A secured creditor of an insolvent national bank is entitled to prove and receive dividends on the full amount due him at the date of insolvency without regard to his collaterals, or any collections he may make upon them,⁹³ provided only that the sums received by way of dividends and from

paper guarantied by the bank, and who have obtained judgments against the bank on its guaranty, stand on the basis of general creditors, and should receive only the amount due them by the books of the bank when it suspended, less payments and amounts collected from collaterals, with legal interest upon the unpaid balance. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591.

An order directing payment of interest by the receiver of a national bank from date of judicial demand is erroneous, as funds coming into the hands of a receiver are turned over to the comptroller, and could not earn interest, and any payment of interest would necessarily be taken from some other trust fund; and this particularly where the involved circumstances of the case made it impossible to pay over the amount without investigation and an accounting. *Richardson v. Louisville Banking Co.*, 36 C. C. A. 307, 94 Fed. 442.

93. Collateral and credit not deducted from claims of secured creditors.—*Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360, affirming decrees in *Merrill v. First Nat. Bank*, 21 C. C. A. 282, 75 Fed. 148; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498, affirming decree in *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231, reversing 50 Fed. 798.

Collections from collateral securities made by a creditor of a national bank after the declared insolvency of the bank need not be deducted from the amount on which the dividends are to be computed by the receiver of the bank, as the secured creditor is a creditor to the full amount due him when the insolvency is declared, and his right to dividends is unaffected by his collateral. Decree. *Armstrong v. Chemical Nat. Bank*, 27 C. C. A. 601, 83 Fed. 556, affirmed. *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

The C. Bank advanced a large sum of money to the F. Bank in March on collaterals, and in June advanced further sum on further collaterals. The

C. Bank collected \$75,000 on the March collaterals after the maturity of the March loan, but entered a general credit thereof to the F. Bank. Held, that the collections should have been applied to the March loan, and were properly deducted therefrom in determining the amount which the C. Bank was entitled to receive as a dividend from the assets of the F. Bank after its insolvency. *Chemical Nat. Bank v. Armstrong*, 50 Fed. 798, reversed in 8 C. C. A. 155, 59 Fed. 372, 16 U. S. App. 465.

"In *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360, in which case this court said that the inquiry on the merits was whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full, it was held that in the distribution of insolvent estates, 'the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and can not be subjected to a different rule. And as the basis on which all creditors draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor can not be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.' 'When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may

the collaterals do not exceed the entire debt.⁹⁴

§ 288 (5) Priorities.—Effect of Diligence in Filing Creditor's Bill or Obtaining Judgment against Bank.—The manifest intention of the National Banking Act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors; and the diligence of a creditor who files a creditor's bill can give him no greater rights than are given any other creditor to share in the distribution of the assets,⁹⁵ and a prayer in the bill that such creditors be given priority over other creditors will not be granted.⁹⁶ The recovery of a judgment by a creditor against a national bank after the appointment of a receiver gives no lien or preference to such creditor.⁹⁷

Trust Funds.—Generally as to the rule that trust funds received by a national bank should be returned intact, see ante, "In General," § 287 (1). In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually argued by the receipt of the trust fund.⁹⁸

be benefited.'" *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

Subject always to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full. *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360.

The legislation in respect to the administration of national banks does not require the application of the bankruptcy rule, but what is called the "equity rule" applies. *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

94. *Merrill v. National Bank*, 173 U. S. 131, 43 L. Ed. 640, 19 S. Ct. 360.

95. **No priority given by diligence in filing creditor's bill.**—*Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

96. *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308.

97. **No lien or preference acquired by recovery of judgment after appointment of receiver.**—*Green v. Walkill Nat. Bank* (N. Y.), 7 Hun 63.

98. **Trust funds as preferential claims—Test as right to preference.**—*Beard v. Independent Dist.*, 31 C. C. A. 562, 88 Fed. 375.

In all cases where an insolvent national bank held funds as trustee, to entitle a claim therefor to a preference over those of general creditors, it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identi-

fied, not by earmarks, but by being traced into the estate and there now found, to its augmentation. *Lucas County v. Jamison*, 170 Fed. 338.

That a deposit of public funds in national bank was wrongful, and known to be so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on its insolvency. *Lucas County v. Jamison*, 170 Fed. 338.

Under Rev. St., § 5242, forbidding preferences among creditors of insolvent national banks, a county whose money has been deposited in a national bank that has become insolvent has no superior right over other depositors in the assets of the bank unless the identical funds deposited have come into the hands of the receiver. *Spokane v. Clark*, 61 Fed. 538.

Where the secretary of the territorial board for leasing school lands without any authority deposits moneys and checks received from the rents of such lands in a national bank, which fails, before the territory can be paid ahead of the other creditors of the bank, it must affirmatively appear that the particular moneys and checks so deposited, or the proceeds thereof, were turned over to the receiver, or went to swell the assets of such bank. *Cherry v. Territory*, 17 Okl. 221, 89 Pac. 192, 8 L. R. A., N. S., 1254.

A national bank received funds of a school district which it had no right to receive as an ordinary deposit, or to mingle with its own funds, and which it undertook to hold for the

If the trust fund was created merely by a check on the same bank drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference.⁹⁹ One recovering money which came into the hands of the receiver of an insolvent national bank as a trust fund, of which such person was owner, is not entitled to interest thereon.¹

Claims Due the United States.—National banks which have failed are, by the provisions of the National Banking Act, withdrawn from the class of persons out of whose assets demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, re-enacted in the Revised Statutes, giving priority to the demands of the United States against insolvents, can not be applied to demands against those institutions. The provisions of that law, and of the National Banking Law, being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it.² Although the United States has a lien on all the assets

special purpose of paying certain bonds of the school district, and no other. It did in fact mingle the funds with its own, and became insolvent, none of the bonds having been presented for payment. It had on hand, at the time it suspended business, cash in excess of the amount of such deposit, which came into the hands of its receiver. Held, that such deposit constituted a trust fund, which was recoverable by the school district from the receiver; the presumption being that so much of the cash on hand as equaled the deposit was the money of the school district. *Merchants' Nat. Bank v. School Dist. No. 8*, 36 C. C. A. 432, 94 Fed. 705.

A national bank, on the morning on which it was closed by the comptroller, presented to the clearing-house association a large amount in checks and drafts upon other banks, a number of which had been deposited by a city and by another bank. The manager of the association received the proceeds of all such checks and drafts, and paid therefrom debts of the bank, leaving a balance to the credit of the bank. Held, that the payments must be presumed to have been made with the money of the bank, and that the remainder included that belonging to the city and the other depositing bank, and constituted a trust fund in the hands of the receiver, representing the checks and drafts the title to which remained in the depositors. *Philadelphia v. Aldrich*, 98 Fed. 487.

⁹⁹ *Beard v. Independent Dist.*, 31 C. C. A. 562, 88 Fed. 375.

Generally, as to the rules of determining the liability of an insolvent bank as trustee, for the funds collected by it, see ante, "Holding Bank as Trustee," § 166 (1).

1. **Interest not allowed on trust fund recovered.**—*Hallett v. Fish*, 123 Fed. 201.

2. **Statutory provisions giving preference to claim of United States inapplicable to demands against insolvent national banks.**—*Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

The declaration of the banking law, that for any deficiency in the proceeds of the bonds deposited as security for the circulating notes of the bank of the United States shall have a paramount lien upon all of its assets, which shall be made good in preference to all other claims, except for costs and expenses in administering the same, considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

"This view of the banking law is not affected by the subsequent enactment in 1867 of the Bankrupt Act, giving priority to the demands of the United States against the estates of bankrupts. That enactment was dealing with the estates of persons adjudged to be insolvent under that law, and covers only the distribution of

to make good any deficiency in the bonds deposited to secure circulation,³ the surplus from the proceeds of bonds deposited as security for circulation, being a fund for all the creditors, is subject to be distributed to them immediately upon the reimbursement of the advances of the United States, and the right of the creditors to it was not affected by the fact that it was at the time in the actual possession of the treasury department. It can not be applied preferentially to other demands due the United States.⁴

Tax Levied Subsequent to Insolvency.—The property of a national bank organized under the act of 1864, levied upon by a county treasurer to

their estates. It has no further reach." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

3. Lien of United States upon assets.—"To make good any deficiency which may exist in the proceeds of the bonds to meet the amount expended in paying the notes of a bank, the act declares that 'the United States shall have a first and paramount lien upon all the assets' of the association. Whatever disposition, therefore, may be made of the property of an insolvent bank, the lien of the United States thereon must exist until the government is fully reimbursed." *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687.

"There is in these provisions a clear manifestation of a design on the part of congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2nd, to secure the assets of the bank for ratable distribution among the general creditors." *First Nat. Bank v. Colby* (U. S.), 21 Wall. 609, 22 L. Ed. 687, quoted in *Woodward v. Ellsworth*, 4 Colo. 580.

4. Surplus from proceeds of bonds to be distributed to creditors.—*Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

"Nor is the relation of the United States to this fund changed by the forfeiture of the bonds, which the comptroller of the currency was authorized upon the failure of the bank to declare. The forfeiture was not a confiscation of the bonds to the government. It amounted only to an appropriation of them, against any other claim, to the specific purposes for which they had been deposited, authorizing their cancellation at market

value when not above par, or their sale, so far as necessary to redeem the circulation or reimburse the United States for moneys advanced for that purpose. When that purpose was accomplished, the bank had the right to any surplus of their proceeds, equally as though that right had been in express terms declared." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

Bonds deposited under Rev. St., §§ 5162, 5167, to secure the circulation of a national bank, are held by the government as a trustee, and the surplus of the proceeds thereof, after payment of the notes can not be set off by the government against an unsecured deposit of postal funds, but must be distributed ratably among all the creditors. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537, 2 S. Ct. 561.

Bonds deposited by a national bank with the United States to secure circulation are a fund out of which on the bank's failure the government may reimburse itself for the amount of any postal funds on deposit with the bank at the time of the failure. *United States v. Cook County Nat. Bank*, Fed. Cas. No. 14,853, 9 Biss. 55.

Act March 3, 1879, providing that no tax on the capital stock of an insolvent national bank shall be paid into the treasury if it will diminish assets necessary for the full payment of all the depositors, applies to a tax levied before the passage of the act but not paid when the act took effect. *Johnston v. United States* (U. S.), 17 Ct. Cl. 157.

The 5 per cent redemption fund deposited by a national bank with the United States treasurer is a fund for the one purpose of redeeming circulating notes, and, the bank becoming insolvent, can not be appropriated by the Treasurer for payment of the tax due the United States under U. S. Rev. St. § 5215. *Jackson v. United States* (U. S.), 20 Ct. Cl. 298.

satisfy a tax levied after the bank has become insolvent, can not be subjected to such demand against a claim for the property by a receiver subsequently appointed.⁵

Debts Due Savings Banks.—A provision of a state statute that debts due savings banks by an insolvent bank shall be preferred is repugnant to the provisions of the National Banking Act requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore void when attempted to be applied to a national bank.⁶

Priority between Bank's Creditors and Pledgee of Stock.—A stockholder's indebtedness to a national bank can not be set off against the claims of a pledgee who received the stock as security for a loan made on the faith of the pledge, and without knowledge of the bank's claim or its insolvency.⁷

Distribution of Funds Obtained by Enforcing Stockholder's Liability.—Where, after a national bank has gone into voluntary liquidation, several creditors take in payment of their claims paper belonging to the bank, with the bank's guaranty of payment, which paper is not paid, such creditors are not entitled to share in the assets obtained by enforcement of the statutory liability of the stockholders, since, after the bank went into liquidation, its powers being limited to the collection of assets and the payment of debts, it could not guarantee payment.⁸

Distribution by Agent of Assets Collected after Assessment of Stockholders.—Where a shareholder of an insolvent national bank failed to pay an assessment of less than the par value of his stock, made by the comptroller, a purchaser for value of the former's shares is not entitled to participate in the equitable distribution by the shareholders' agent of money collected and turned over to him by the comptroller after the assessment was made, until the shareholders who paid the assessment are first reimbursed.⁹

§ 288 (6) Allowance of Interest on Claims.—Although, as has been seen, it is the duty of the comptroller, in paying dividends, to take the value of the claim at the date of insolvency as the basis of distribution, and not the amount of a judgment for a contested claim, including interest to date,¹⁰ yet it has been held that where a national bank is declared in default by the comptroller of the currency, and a receiver of it is appointed by him,

5. Tax levied subsequent to insolvency of bank.—*Woodward v. Ellsworth*, 4 Colo. 580.

6. Provisions of state statute preferring debts due savings banks repugnant to National Banking Act and void.—*Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

7. Priority between bank's creditors and pledge of stock.—*McConville v. Means*, 10 O. Dec. 452, 21 Wkly. L. Bull. 193.

8. Distribution of fund obtained by enforcing stockholders' liability.—*Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

9. Distribution by agent of assets collected after assessment.—*Richardson v. Wallace*, 39 S. C. 216, 17 S. E. 725.

10. See ante, "Basis of Distribution of Assets," § 288 (4).

under the fiftieth section of the Act of June 3, 1864, and a sufficient fund is realized from its assets to pay all claims against it and leave a surplus, the comptroller ought to allow interest on the claims, during the period of administration, before appropriating the surplus to the stockholders of the bank.¹¹ Though the comptroller has taken control of the affairs of a national bank for the purpose of winding them up, a creditor may maintain an action against the bank to recover interest accruing on his claim since the comptroller took possession.¹² An action of assumpsit, by the holder of a claim against the bank to recover such interest, will not lie against the receiver of the bank, or against the comptroller of the currency, but will lie against the bank.¹³

11. Allowance of interest on claims.—*Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480.

In an action of assumpsit by the holder of a claim against a national bank, which has been declared in default to recover interest during the period of administration, interest is recoverable upon all demands for money due and unpaid, by way of damages for the nonpayment, after such demands became due. *Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480.

A depositor in a national bank, when it suspends payment, and a receiver is appointed, is entitled, from the date of his demand, to interest upon his deposit. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176.

The interest being in a liquidated sum at the time of the payment of the deposit, an action lies to recover it, and interest thereon. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 24 L. Ed. 176.

12. Recovery of interest by action against bank.—*Chemical Nat. Bank v.*

Bailey, Fed. Cas. No. 2,635, 12 Blatchf. 480.

Necessity for demand of payment.—Since a national bank, by defaulting, and thus initiating proceedings by the comptroller to wind up its affairs, thereby disables itself from paying a deposit, no demand of payment is necessary to entitle the depositor to recover interest on deposit from the time the comptroller intervened. *Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480.

13. Depositor remedy by action of assumpsit against the bank.—*Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480.

Assumpsit can not be maintained by a creditor of an insolvent national bank against the comptroller to recover interest on his claim accruing during the period of administration, since the only relief, if any could be had, would be to enforce a distribution of the fund in the comptroller's hands. *Chemical Nat. Bank v. Bailey*, Fed. Cas. No. 2,635, 12 Blatchf. 480.

CHAPTER XVI.

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V. SAVINGS BANKS.

§ 289. Nature and Status.—Savings banks are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty.¹ Whether a bank is a savings bank is determined not by the designation in its charter, but by its organization,

1. Savings banks defined.—*Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. See, also, *Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897, and *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907.

"Until recently, the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, enure wholly to the benefit of the depositors, in dividends, or in reserved surplus for their greater security." *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777.

The power given to *femes covert* and *minors* to make deposits, and when

their deposits reach \$100, at their option to be converted into stock, if valid, does not denote a savings bank. *State v. Lincoln Sav. Bank*, 82 Tenn. (14 Lea) 42; *State v. Nashville Sav. Bank*, 84 Tenn. (16 Lea) 111.

"Institutions called savings and building associations are * * * stock associations of a novel and peculiar character, organized under a general law, and are quite distinct from savings banks and societies for savings, which are merely banks of deposit and loan, having no stock, and which were created under special charters from the legislature of the state." *Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907.

powers and mode of doing business, provided in the incorporation act.² Not infrequently savings banks and societies for savings have no capital stock or stockholders,³ and are without authority to make discounts or issue any circulating medium.⁴ In some jurisdictions savings banks are defined by statute, or their purpose, functions and powers are prescribed by the act under which they are incorporated.⁵ In absence of rules assented to by its

2. How question whether bank is a savings bank determined.—*State v. Lincoln Sav. Bank*, 82 Tenn. (14 Lea) 42; *State v. Nashville Sav. Bank*, 84 Tenn. (16 Lea) 111.

3. No stock or stockholders.—*Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907; *Bank v. Collector* (U. S.), 3 Wall. 495, 18 L. Ed. 207.

National savings bank of the District of Columbia.—The Act of congress approved May 24, 1870 (16 Stat. 137), incorporating the National Savings Bank of the District of Columbia, does not authorize the creation of any corporate stock or capital. The profits of the institution, after deducting the necessary expenses of conducting it, enure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security. *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777.

The bond filed pursuant to the 11th section of that act is in no sense capital owned by the bank or the corporators. It was required solely to secure depositors and creditors. *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777.

"The institution having no capital stock, whatever liability, if any, there may be to the corporators, must be satisfied out of the profits made from the deposits." *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777.

4. No authority to make discounts or issue circulating medium.—*Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907; *Bank v. Collector* (U. S.), 3 Wall. 495, 18 L. Ed. 207.

Corporation held not a mere savings bank.—Articles of incorporation stated that the "corporation was organized for the following named purposes: To do a general savings and commercial banking business; to buy and sell real personal property; to discount bills, notes, and other commercial and negotiable paper and instruments; to

buy and sell exchange; to receive money on deposit; to borrow and loan money; and to do any and all acts incident to or necessary to the transaction of any and all the matters above stated." Held, that this corporation is not a mere savings bank, but has all the attributes of an ordinary commercial bank. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

5. Georgia statute defining savings banks construed.—A charge that, in determining whether a bank is a savings bank, under Act 1889, p. 180, declaring savings banks to be those whose deposits are not "subject to check," such words mean subject to payment without limitation or restriction, except that the check must be presented within banking hours on banking days, is correct. *Dottenheim v. Union Sav. Bank, etc., Co.*, 114 Ga. 788, 40 S. E. 825.

Savings banks as organized under laws of Massachusetts and New York.

—"The main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase." *National Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

The National Savings Bank of the District of Columbia, incorporated under the Act of congress approved May 24, 1870 (16 Stat. 137), "is not a commercial partnership, nor is it an artificial being, the members of which have property interest in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church wardens for the con-

customers, a savings bank is to be governed by the same legal principles which apply to other moneyed institutions.⁶

§ 290. Control and Regulation in General.—Savings banks are subject to legislative control and regulation.⁷

§ 292. Incorporation and Organization.—The incorporation and organization of a savings bank or savings society must be in conformity with constitutional and statutory provisions authorizing such incorporation and organization and prescribing the method by which it may be accomplished.⁸ In some jurisdictions it is made a penal offense to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as such.⁹ A

servation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage, without any interest in its members. The title of the act incorporating it indicates its purpose; namely, an act to incorporate a national savings bank; and the only powers given it were those we have mentioned—powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives." *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. Ed. 777.

6. Governed by legal principles applicable to other monied institutions.—*Mills v. Albany Exch. Sav. Bank*, 28 Misc. Rep. 251, 59 N. Y. S. 149; *Siegel v. State Bank* (App. Div.), 123 N. Y. S. 220.

7. The Kansas Banking Act of 1891 was intended to include a revision of the Savings Bank Act, and to be a substitute for it, and therefore superseded Gen. St. 1868, c. 23, art. 16, § 128, being a portion of such act, and thereafter all savings banks previously organized were amenable to the provisions of such Act of 1891. *West v. Topeka Sav. Bank*, 66 Kan. 524, 72 Pac. 252, 63 L. R. A. 137, 97 Am. St. Rep. 385.

Savings banks not required to take out a license.—A savings bank authorized by its charter to deal in notes, drafts, and bonds, and buy and sell bills of exchange, is not within the Missouri statute. *Wag. St.*, p. 247, requiring money brokers and exchange dealers to take out a license, since the act requiring such license was intended to apply only to moral agents, who are capable of taking oath, and suffer-

ing the penalties for perjury. *State v. Field*, 49 Mo. 270.

8. Incorporation and organization must be in conformity with constitutional or statutory requirements.—Under the Constitution of Illinois, art. 11, § 5, declaring that no act authorizing corporations or associations with banking powers, whether of issue, deposit, or discount, shall take effect, unless submitted to the people at a general election, Act Ill. 1887, providing for the organization of savings societies authorized to receive and invest deposits, and to declare dividends on them, is void. Section 5 is not confined to corporations having stockholders that own the bank. *Reed v. People*, 125 Ill. 592, 18 N. E. 295, 1 L. R. A. 324.

Statute not affecting corporations not electing to exist under it.—As the California Statute Civ. Code, pt. 4, § 288, repealing the Act of 1862 so far as to prohibit future incorporations under it, provides that no existing corporation should be affected by part 4 unless it elects to continue its existence under it, etc., the adoption of part 4 does not affect corporations which do not elect to exist under it. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317.

Statute not mandatory as to banks organized under prior statute.—The Minnesota Statute, Laws 1875, c. 84, amending Laws 1867, c. 23, providing for the incorporation of saving associations, enacting that any savings association which had been theretofore incorporated, and was doing business as a savings association or bank, might avail itself of the privileges of the act, subject to all the liabilities prescribed therein, is not mandatory as to savings banks organized under Act 1867. *Richards v. Minnesota Sav. Bank*, 75 Minn. 196, 77 N. W. 822.

9. Advertising, or soliciting or re-

savings bank, formed for the pecuniary benefit of its members, is not a "benevolent" or "charitable" society within the meaning of those words in a statute, authorizing the incorporation of benevolent and charitable societies.¹⁰

§ 293. Corporators and Stockholders.—Depositors Are Creditors for Whose Debts Stockholders Are Liable.—Depositors in a savings bank whose deposits are payable in a certain time after demand, and bear such interest as the directors may determine, the profits, less such interest payments, belonging to stockholders, are creditors for whose debts the stockholders are liable.¹¹

Capital Stock a Security to Nonstockholding Depositors.—By statute in some jurisdictions the capital stock of savings banks is made a security to depositors who are not stockholders.¹²

ceiving deposits, as a savings bank, prohibited.—The New York Statute, Laws 1882, c. 409, § 283, making it unlawful "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank," does not forbid the carrying on of a business substantially as that of a savings bank, but it only forbids the conducting of such business under a claim or pretense of being a savings bank. *People v. Binghamton Trust Co.*, 65 Hun 384, 29 N. Y. S. 179, 47 N. Y. St. Rep. 570, affirmed in 139 N. Y. 185, 34 N. E. 898.

The purpose of the New Hampshire Statute. Laws 1907, p. 111, c. 112, providing that no person, corporation, or association, except savings banks incorporated in the state, etc., shall make use of words indicating that a place of business is the office of a savings bank, nor make use of any printed or written matter having words indicating that a business is the business of a savings bank, nor receive deposits and transact business in the manner of a savings bank, etc., is to prevent the obtaining of the money of depositors on a false representation that the party receiving it is authorized to do and is doing a business like that of a savings bank, and the act does not interfere with the general business of investment by banking institutions of deposits received from their customers on which they agree to pay interest, and the act, so construed, is intended to apply to and includes national banks. *State v. People's Nat. Bank*, 75 N. H. 27, 70 Atl. 542.

The New Jersey Statute. P. L. 1899, p. 455, authorizing trust companies "to receive money on deposit to be sub-

ject to check or to be repaid in such manner and on such terms and with or without interest, as may be agreed upon by the depositor and the said trust company," does not repeal, by implication, P. L. 1876, p. 357, which declares "that it shall not be lawful for any bank, banking association, firm, stock company, corporation or individual banker, to advertise or put forth a sign as a savings bank, either directly or indirectly, or in any way to solicit or receive deposits as a savings bank, except in the case of banks or deposit companies now authorized by law to receive deposits on interest, or banks incorporated under this act." *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

10. Savings bank can not be incorporated under statute authorizing incorporation of benevolent and charitable societies.—*Sheren v. Mendenhall*, 23 Minn. 92, construing Pub. St. ch. 17, §§ 56, 57.

11. Depositors are creditors for whose debts stockholders are liable.—*Wells v. Black*, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162.

12. Stockholders receiving certificate of deposit a stockholding depositor.—A certificate of deposit is not a promissory note, under the California Statute, Civ. Code, § 3095, reciting that "bills of exchange," "promissory notes," and "certificates of deposit" are classes of negotiable instruments, and hence a bank stockholder receiving a certificate of deposit does not loan the money to the bank, but is a mere stockholding depositor, within Act April 11, 1862, § 10 (St. 1862, p. 201), providing that

Effect of Limited Liability Clause.—A provision in the constitution of a savings-fund society that the joint fund shall alone be liable for the debts and engagements of the association, and that no creditor shall have recourse to the separate property of any member, will not relieve the members of the society from personal liability for money received upon special deposit where the certificates of deposit are without limitation as to personal liability;¹³ and this is so notwithstanding that the depositor had formerly been a member of the society.¹⁴

Double Liability of Stockholders.—In some states, by constitutional provision or statute, a double liability is imposed on the stockholders of a savings bank, if the bank becomes insolvent.¹⁵ But where the stock of a bank largely exceeds the debts, and remains wholly unpaid, the double liability of the stockholders can not be enforced.¹⁶

Application of Stock after Stockholder's Death.—A savings bank can not apply stock belonging to the estate of one deceased in payment of his indebtedness to the bank. The administrator is entitled to the amount for distribution among creditors generally.¹⁷

Facts Not Charging Creditor with Knowledge of Bank's Noncompliance with the Law.—A creditor of a savings bank proceeding to enforce the secondary liability of the stockholders is not chargeable with knowledge that the bank has not complied with the law and paid up half of its capital stock because it was informed that certain of the stockholders had given notes for their subscription, where it did not appear that such creditor knew that the notes represented the entire stock subscription.¹⁸

Liability of Stockholders Not a Penal Liability.—A liability of stockholders in a savings bank to the depositors and creditors of the

the capital stock of saving banks shall be security for nonstockholding depositors. *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059.

13. **Effect of limited liability clause.**—*Beaver v. McGrath*, 50 Pa. 479.

14. *Beaver v. McGrath*, 50 Pa. 479.

15. **Stock not within constitutional provision imposing a double liability.**

—The Minnesota Statute, Gen. Laws 1867, providing for the incorporation of savings banks, contains no provision for capital stock. Under this act a bank was incorporated, which by Sp. Laws 1873, c. 117, was changed to a bank with a capital stock of \$100,000, which stock did not represent the assets of the institution, but was a guaranty fund to the depositors; the holders of stock having no power to elect the trustees, nor any voice in the management of the institution. Held, that such stock was not within the constitutional provision imposing a double liability on the insolvency of the bank. *State v. Savings Bank*, 87 Minn. 473, 92 N. W. 403.

Double liability constitutes a trust fund.—The double liability of stockholders of a bank created by Ky. St. 1903, § 547, constitutes a trust fund, so that creditors of an insolvent savings bank may sue to have the trust administered in equity without first having obtained a judgment at law on their demands. *Conway v. Owensboro Sav., etc., Trust Co.*, 165 Fed. 822.

16. **When double liability can not be enforced.**—*Herron v. Vance*, 17 Ind. 595.

17. **Stock, after stockholder's death, can not be applied to indebtedness to bank.**—*Merchants' Bank v. Shouse*, 102 Pa. 488.

The lien given by the general banking act of Pennsylvania applies to banks of issue only. *Merchants' Bank v. Shouse*, 102 Pa. 488.

18. **Facts not charging creditor with knowledge of bank's noncompliance with the law.**—*Dickason v. Grafton Sav. Bank Co.*, 27 O. C. C. 357.

bank, to an amount equal to the amount of their stock, respectively, until after a transfer of stock, published in a public newspaper, is not a penal liability.¹⁹

Suit by Depositor against Stockholder—Effect of Payment to Other Depositors.—In a suit by a depositor against a stockholder of a savings bank on his individual liability for the ultimate redemption of the deposits in proportion to the amount of stock held by him, it is a good defense that previously to the commencement of the suit defendant has discharged his obligation by paying to depositors other than the plaintiff an amount equal to the full proportion his stock bears to the amount due to depositors.²⁰ But if such payment is not made until after the suit is begun, it is no defense.²¹

The fact that a statute, which attempts to relieve stockholders from personal liability for the debts or savings banks, is invalid, leaving in existence such personal liability, does not alter the stockholder's rights as a depositor.²²

Petition for Unpaid Assessments—Failure to Give Notice of Assessments.—When, in a petition filed by an assignee of a savings bank against the stockholders for unpaid assessments, the assignee has failed to give the notice specified in the decree ordering the assessment, a verdict is properly rendered against the bank.²³

§ 294. Officers and Agents—§ 294 (1) Eligibility for Office.—Where the charter of a savings institution provides that no director or officer of a bank of circulation or deposit shall be eligible to act as trustee or officer of the institution, a director of a bank of circulation and deposit, who has allowed himself to be voted for as an officer of the savings institution, will be presumed to have thereby resigned as director in the bank, and is, therefore, eligible for the office.²⁴

§ 294 (2) Election.—Where the charter of a savings institution requires the vote of a majority of the trustees present to elect an officer, and at a meeting of twelve trustees, six votes are cast for one person, four for

19. Liability of stockholders not a penal liability.—*Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613.

20. Suit by depositor against stockholder—Effect of payment to other depositors.—*Jones v. Wiltberger*, 42 Ga. 575.

21. *Jones v. Wiltberger*, 42 Ga. 575.

22. Effect of invalidity of statute attempting to relieve stockholders from personal liability.—*Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317, so holding in relation to the California Statute, St. 1862, p. 201, § 27.

23. Petition for unpaid assessments—Failure to give notice of assessments.

—*Franklin Sav. Bank v. Fatzinger* (Pa.), 8 Sad. 21, 4 Atl. 912.

Where a petition is filed by the assignee of a savings bank for the benefit of creditors, against the stockholders, for unpaid assessments, and the court, in accordance with the petition, orders an assessment, it is error to hold that, when defendants deny liability to pay assessments on other grounds than want of notice, they are not entitled to notice. *Franklin Sav. Bank v. Fatzinger* (Pa.), 8 Sad. 21, 4 Atl. 912.

24. Eligibility for office—Charter construed.—*People v. Conklin* (N. Y.), 7 Hun 188.

another, and one for another, one trustee refusing to vote, there is no election.²⁵

§ 294 (3) Tenure of Office.—Under a statute providing that the trustees of a savings bank shall be chosen annually, and shall appoint a treasurer, who shall hold office during their pleasure, the office of treasurer is not an annual one. He holds office during the pleasure of the trustees.²⁶ Where a by-law of a savings bank provides that “the attorney shall hold office at the pleasure of the trustees,” the appointment of an attorney for one year is insufficient to constitute a contract of employment for that term.²⁷

§ 294 (4) Compensation.—The compensation of an attorney for a savings bank, consisting of various sums paid to the bank from time to time for the examination of the title to securities of applicants for loans from the bank, is in no sense a “salary,” as that word means “a fixed sum to be paid by the year or periodically for services.”²⁸ Where the compensation of an officer of a savings bank is made contingent upon its net profits, and the bank holds government bonds, which rise in value, but which the bank does not propose to sell, such increase in value is not a “profit.”²⁹

§ 294 (5) Duties and Liabilities—§ 294 (5a) In General.—Trustees of a savings association occupy a fiduciary relation toward its depositors.³⁰ The managers of a savings institution are trustees of a public franchise granted to and held by them for the benefit of the public, and especially for that part of the public in the immediate neighborhood, as well as for the depositors.³¹ The directors of a savings fund society are personally liable to the depositors for the maladministration of their office.³²

25. Vote of majority of trustees present required to elect an officer.—*People v. Conklin* (N. Y.), 7 Hun 183.

26. Tenure of office.—*Commonwealth v. Reading Sav. Bank*, 129 Mass. 73.

27. Rebadow v. Buffalo Sav. Bank, 63 Misc. Rep. 407, 117 N. Y. S. 282.

28. Salary defined.—*Rebadow v. Buffalo Sav. Bank*, 63 Misc. Rep. 407, 117 N. Y. S. 282.

29. Compensation made contingent upon net profits.—*Jennery v. Olmstead* (N. Y.), 36 Hun 536.

30. Trustees occupy a fiduciary relation toward depositors.—*Dickson v. Baker*, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447.

A bank which allows a stated interest on deposits is not a savings bank, in the sense that the directors are trustees, and hold to the depositors a relation of confidence and trust. *Colorado Sav. Bank v. Evans*, 12 Col. App. 334, 56 Pac. 981.

31. Managers are trustees of a public franchise.—*Barrett v. Bloomfield*

Sav. Inst., 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. Y. Eq. 431, 57 Atl. 1131.

The managers of a savings institution occupy the position of holders of a public trust of a benevolent and charitable nature, and it is their duty to preserve and foster with reasonable zeal the object of the trust. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

The managers of a savings institution have no more right to destroy the entity of the corporation while transferring to themselves its most valuable asset, its good will, than an ordinary trustee of property has to purchase the property himself, though paying a fair price for it. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

32. Liability for maladministration of office.—*Maisch v. Saving Fund (Pa.)*, 5 Phila. 30.

But the directors of such a society,

and for the proper care of the deposits intrusted to the society.³³ The trustees of a savings bank are responsible for the acts of the officers whom they place and retain in position.³⁴ The managers of such a bank are liable for the want of ordinary care and diligence in the management of the bank;³⁵ and the fact that they are unpaid will not relieve them from this liability.³⁶ Such managers are liable, if they participate in or promote prohibited acts which lead to loss, or if they neglect to bestow on the affairs of the bank that measure of care which the law exacts of them, and in consequence of which their associates are enabled to do acts causing loss.³⁷

§ 294 (5b) Liability for Losses on Loans and Investments.—The trustees, directors, managers or other responsible officers of a savings bank who make loans or invest the funds of the bank in a manner contrary to law, or prohibited by the charter of the bank or the act under which it is incorporated, are personally liable for losses resulting from such loans or investments.³⁸ Where the manager or a responsible officer knows of an ir-

who never took their seats in the boards, and against whom the depositors do not allege any knowledge of frauds, are not personally liable for maladministration. *Maisch v. Saving Fund (Pa.)*, 5 Phila. 30.

33. Liability for proper care of deposits.—The directors of a savings fund society, though ignorant of fraud in its organization, are liable to depositors for the proper care of the deposits intrusted to the society. *Leffman v. Flanigan (Pa.)*, 5 Phila. 155.

34. Responsibility of trustees for acts of officers.—*Paine v. Irwin (N. Y.)*, 59 How. Prac. 316.

A transaction entered upon the books of a savings bank, although made by the bank officers, is presumed to have been done with the knowledge and assent of the trustees. *Paine v. Irwin (N. Y.)*, 59 How. Prac. 316.

35. Liability of managers.—*Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775.

36. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775.

37. *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 3 Atl. 360; *S. C.*, 42 N. J. Eq. 234, 7 Atl. 327, affirmed in 42 N. J. Eq. 647, 9 Atl. 685; *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866.

A charter incorporating a savings bank provided that it should be conducted by managers, who should meet semiannually, and as much oftener as a majority should deem expedient, fill vacancies in their number, and choose officers, who should give security for fidelity. Held that, while the managers could appoint officers and committees to conduct the affairs of the bank, they

were bound to such circumspection of the actions of such officers and committees as a reasonably prudent man would exercise in his own business, and were liable for losses occasioned by the omission of such circumspection. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

For money secretly withdrawn and covered by false entries in the books and fictitious mortgages, running through a series of years, and not discovered by the managers or the members of the executive committee who examined the lists containing such mortgages and the books, managers in office during the entire time are liable, and members of the executive committee are liable for moneys so withdrawn during their term of office. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

38. Loans not permitted by act of incorporation.—*Knapp v. Roche*, 44 N. Y. Super. Ct. 247.

Loan made to president on insufficient security.—The president is primarily liable for loss of a loan made to him on insufficient security, not submitted to the finance committee. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

Loan to one person of sum greater than one-fourth of capital stock.—The directors of a savings bank, who have lent to one person a sum greater than one-fourth of the bank's capital stock, contrary to the prohibition of the Missouri Statute, Rev. St. 1879, § 916, are liable to the bank or its receiver for any loss that may accrue from such loan, although the statute itself does

regular or unlawful loan and acquiesces in it, he will be liable for losses

not provide any penalty for its violation. *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962; *Thompson v. Swain*, 107 Mo. 594, 17 S. W. 967.

Investment on mortgage on real estate prohibited by charter.—A director and member of the finance committee of a savings bank, which afterwards became insolvent, having acted with the president in investing its funds on mortgage on real estate not worth at least double the amount of the sum invested above all incumbrances, against the prohibition in its charter (Laws 1869; P. L. 80, § 10), is chargeable with the loss on the investment. *Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866.

The treasurer of a savings bank, who was also one of its managers, assigned to it a bond and mortgage owned by him on lands not worth double the mortgage, as required by the bank's charter, and without submitting the investment to the finance committee for approval, as required by its by-laws. Held, that he was liable for a loss sustained on such bond and mortgage, and that the fact that the managers did not object to or repudiate the transaction for six years was no defense, whether his breach of duty was known or not known by the other managers. *Williams v. Riley*, 34 N. J. Eq. 398.

Investments by president and treasurer in contravention of charter and by-laws.—The by-laws provided that the president should execute all releases and other documents requiring the common seal, and, with the treasurer, have charge of the seal, and all bonds, mortgages, and other property and securities; and that the treasurer should make an itemized report to the meetings of the managers of the bank's financial condition. A finance committee was appointed to attend to all applications for loans, and to meet as required to invest and loan the funds. The executive committee was empowered to take general charge of the bank, examine the books of account and securities, and report at the meetings of the managers. It was provided that all checks should be drawn by the treasurer, and countersigned by the president. It appeared that it was the treasurer's custom to sign sheets of blank checks, which the president filled up and used at his convenience. Held, that where the president and treasurer together made investments on securi-

ties not within the restriction of the charter, or not such as ordinarily prudent men would make in the transaction of their own business, without submitting them to the finance committee and securing its approval, they were primarily liable for losses occasioned thereby. *Williams v. McNay*, 46 N. J. Eq. 25, 18 Atl. 824.

Purchase of valueless paper of another bank.—Under the constitution of California art. 12, § 3, providing that the directors of corporations shall be jointly and severally liable to the creditors and stockholders for all monies misappropriated by officers during their terms of office, the directors of a savings bank with a capital of \$100,000, of which \$20,000 was paid up, and with no reserve fund, who willfully misappropriated its funds to hold up another bank, which was principally owned and entirely managed by them, by pretending to purchase its valueless paper, contrary to Civ. Code, § 571, providing that loans by savings banks must be on adequate security, and § 574, prohibiting the purchase of securities of any kind by such corporations other than those of the United States, state, counties, cities, cities and counties, or towns of the state, unless it has a capital stock or paid-up reserve of not less than \$300,000, are liable to creditors and stockholders for such misappropriation. *Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

Loans upon insufficient security to corporation in which a trustee is a stockholder.—A loan was made by a savings bank, to three persons, of \$20,000, \$15,000, and \$15,000, respectively, upon a promissory note by each for the amount he received, with collateral security of promissory notes of a foreign corporation, which notes were secured by trust deeds of such corporation upon unimproved vacant lots without the state, not worth over \$10,000. One of the trustees of the bank at the time of the loan was a large stockholder in said corporation, and the loans were intended to be, and were, in fact, loans to the corporation. These facts were known to the trustees of the bank, or could, with reasonable diligence, have been learned by them. The loans were intended to be to said trustee, and were made because of his interest in the corporation, and the loans were in fact loans upon the security of the lots. Held, that un-

occasioned thereby.³⁹ But for losses sustained by reason of the president's releasing securities for a loan to one of the managers, so as to reduce the security below the lawful limit, without authority from the board of managers, the president and the manager, to whom the release was executed, are alone liable; it not appearing that any of the other managers knew of such release.⁴⁰ As between those managers not individually concerned in unlawful loans, the primary liability is on the members of the executive committee.⁴¹ For money taken by the president from the bank without

der the laws of New York affecting savings banks the transaction was unauthorized and illegal, and a demurrer to the complaint, alleging these facts, in an action to hold the trustees personally liable, would not be sustained. *Paine v. Irwin* (N. Y.), 59 How. Prac. 316.

Ultra vires loan for which all trustees are personally liable.—Under the New York Statute, Laws 1860, c. 280, as amended by Laws 1866, c. 408, prohibiting a savings bank from making a loan on bond and mortgage except on productive property worth double the loan, and Laws 1868, c. 845, prohibiting loans on the security of lands outside the state, and Laws 1860, c. 280, prohibiting a trustee from indirectly borrowing funds of the bank, a loan by a savings bank to a corporation of which a trustee of the bank is a stockholder, secured by vacant lots in another state, worth less than the loan, is ultra vires, and all the trustees are personally liable therefor. *Paine v. Barnum* (N. Y.), 59 How. Prac. 303.

Investments by means of checks signed in blank—Secondary liability.—A purchase of realty by officers of the bank which was not authorized by the charter, and which was not submitted to the finance committee or the board of managers, rendered such officers primarily liable for loss occasioned thereby; and, when the purchase was made by means of checks signed in blank by the treasurer, he was secondarily liable. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

For losses on illegal investments made by the president by means of checks signed and left in blank by the treasurer, the president was primarily liable, and the treasurer was secondarily liable. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

39. Acquiescence in unlawful loans.—For losses occasioned by loans made by the president, habitually and continually, in disregard of the charter and by-laws, and not interfered with by the managers, all managers in of-

fice at the time of the making of the loan are liable. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

But they are not liable for the loss of the first of such loans, made a year or more before the others, as it could not reasonably have been anticipated. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

For losses sustained by reason of an unlawful loan made by the president by means of checks signed by the treasurer in blank and left with the secretary, and not submitted to the finance committee, the secretary is secondarily liable, where he knew of the irregularity of the transaction, and acquiesced in it. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

For losses from an unlawful and imprudent loan not submitted to the finance committee, the negotiator of which was not shown, the treasurer was primarily liable for allowing the funds to be used for that purpose. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

Loans by bookkeeper without knowledge of trustee.—A trustee is not personally liable for prohibited loans made by the bookkeeper, where he had no knowledge thereof. *Knapp v. Roche*, 44 N. Y. Super. Ct. 247.

After the bookkeeper of a savings bank had made a loan to C. such as was not authorized by the act incorporating the bank, he informed a trustee thereof, and asked him what he should do about it, and the trustee said: "Do whatever you please. Charge it to C." Held, that the trustee had not ratified the loan, so as to make himself personally liable therefor. *Knapp v. Roche*, 44 N. Y. Super. Ct. 247.

40. Securities for loan released without knowledge of managers.—*Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

41. Primary liability as between managers not individually concerned.—*Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

For money withdrawn by the presi-

security, on a check signed by himself and the treasurer, the order of liability is (1) the president; (2) the treasurer; (3) the executive committee; and (4) all the managers.⁴² Though the directors are ignorant of the affairs of the bank, and are not guilty of bad faith, they are liable to the depositors for losses resulting from their gross negligence.⁴³ The managers can not avoid responsibility for losses occasioned by prohibited investments on the grounds that they did not have time or ability to perform their duties, and did not know of such investments,⁴⁴ or upon the ground that they believed the investments to be legal, if it does not appear that such belief arose from a misconstruction of the charter.⁴⁵ But a director will not be held liable to indemnify the bank against a loss resulting from a mortgage investment, in which he acted in good faith, and, as he supposed, for the benefit of the bank, and with ordinary care and prudence.⁴⁶ A trustee may be released from

dent on his individual check and demand note, the executive committee are, after him, primarily, and the managers then in office secondarily, liable. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

42. Money taken on a check signed by president and treasurer—Order of liability.—*Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

43. Facts not excusing gross negligence.—*Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

The president of a savings bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank with little or no security, though such borrowers were responsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent on the deposits. Held, that the directors were liable to the depositors. *Marshall v. Farmers', etc.*, Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

44. Facts not excusing managers for losses occasioned by prohibited investments.—So held where the charter prohibited the investment of the bank's funds on merely personal security, and large sums were invested in commercial

paper, such investments constituting one of the principal occupations of the bank. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

45. The charter provided that the bank should invest no money in public stock other than that of the United States, and certain states and cities, "nor on bond and mortgage, except on real estate, worth," etc. Held that, even if this were misleading as to the right to invest in personal securities, a belief in the legality of such investments would not excuse managers for losses, where it did not appear that such belief arose from a misconstruction of the charter. *Williams v. McKay*, 46 N. J. Eq. 23, 18 Atl. 824.

The charter provided that "all deposits" should be used and improved to the best advantage, and that the profits should be divided among the depositors. Held, that a mistaken belief by managers that it was legal to invest "special deposits," as distinguished from "savings deposits," in commercial paper, did not excuse them from liability for losses occasioned thereby, where such belief arose, not from reading the charter, but from rumor, and misstatements of others. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

Even if such belief arose from a bona fide misconstruction of the charter, the managers are not excused from liability thereby as an extensive discount business is foreign to the object of a savings bank, and the managers were put upon inquiry. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

46. Mortgage investment made in good faith and with ordinary care and prudence.—*Williams v. McDonald*, 37 N. J. Eq. 409.

liability for an illegal investment on payment of the loss by a subsequent trustee.⁴⁷

§ 294 (5c) Liability for Improvidence and Reckless Extravagance.—The trustees of a savings bank are personally liable for losses resulting from their improvidence and reckless extravagance.⁴⁸

§ 294 (5d) Liability for Paying Dividends or Interest Not Earned.—The trustees of a savings bank are jointly and severally liable for a payment of dividends or interest not earned, under a resolution declaring dividends, and passed either with their concurrence or subsequent approval.⁴⁹

§ 294 (5e) Liability of Directors for Cashier's Misapplication of Funds.—Where the directors of a savings bank act with ordinary diligence in the employment of a cashier, but are deceived by a systematic and ingenious statement of false accounts, they are not liable to the stockholders for his misapplication of the funds of the bank. To render them liable, fraud or wilful neglect of duty must be shown.⁵⁰

§ 294 (5f) Liability of Trustees Who Do Nothing in Execution of the Corporate Power.—Trustees qualified under a statute, for the establishment of savings banks, who do nothing in execution of the corporate power, but under a corporate name do a general banking business, and loan money at interest, and give certificates of deposit signed by a cashier, are personally liable on such certificates, and are not shielded from liability by the mere existence of the corporate agency.⁵¹

47. Release from liability for illegal investment.—*Hun v. Van Dyck* (N. Y.), 26 Hun 567, affirmed in 92 N. Y. 660.

48. Liability for improvidence and reckless extravagance.—The assets of a savings bank were less than its debts by several thousand dollars. The trustees, knowing this, bought a lot for \$29,000, paying \$10,000 in cash, and erecting a banking house at a cost of \$27,000, giving a mortgage for \$30,000. The object of the trustees was to better the financial condition of the bank by increasing its deposits. Its charter empowered it to purchase a lot for a banking house. Two years afterwards the bank failed. Upon suit brought by the receiver against the trustees, held, that they were liable for improvidence and reckless extravagance. *Hun v. Cary*, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546.

49. Liability for paying dividends or interest not earned.—*Van Dyck v. McQuade*, 57 How. Prac. 62, 45 N. Y. Super. Ct. 620.

A trustee of a savings bank is individually liable at common law for will-

fully co-operating with the other trustees in declaring and paying dividends where there are no surplus profits. *Van Dyck v. McQuade*, 57 How. Prac. 62, 45 N. Y. Super. Ct. 620.

The provisions of the New York Statute, Laws 1875, c. 371, declaring the trustees of savings banks who vote for the declaring and crediting of any interest or dividend in excess of the interest or profits earned personally liable to the corporation for the amount of the excess, does not limit the interest which lawfully may be voted for to net profits. If a trustee votes for a dividend less than the whole amount of interest or profits earned, without any deduction therefrom for expenses, although the earnings have not been actually received, he does not, in the absence of fraud or bad faith, overstep his statutory duty, and he is not liable to the penalty. *Van Dyck v. McQuade*, 86 N. Y. 38.

50. Liability of directors for cashier's misapplication of funds.—*Dunn v. Kyle* (Ky.), 14 Bush 134.

51. Liability of trustees who do nothing

294 (5g) Diligence and Good Faith Required in Selling Property.—Where the treasurer of a savings bank, who is also a trustee and a member of its financial committee, is intrusted by the bank with the duty of selling its property, he acts as agent of the bank, and is bound to the degree of diligence and good faith which should govern the conduct of agents generally. He can not, by claiming to act as trustee and member of the finance committee, escape liability to the bank if he sells the property for less than the best price that might have been obtained.⁵²

§ 294 (5h) Method of Determining Liability.—The liability of different members of a board of directors charged with mismanagement of the affairs of a savings fund society, will be determined by the aid of a master appointed to inquire whose default occasioned the loss.⁵³

§ 294 (5i) Mode of Enforcing Liability.—The mode of enforcing the liability of trustees and officers of savings banks is in some states prescribed by statute.⁵⁴

§ 294 (6) Prohibition against a Trustee Becoming a Surety.—By statute in New York a trustee of a savings bank was prohibited from becoming a surety for money loaned by the bank.⁵⁵

§ 294 (7) Prosecutions.—See ante, "Prosecution and Punishment," § 62; "Prosecution and Punishment," § 85.

§ 295. Powers in General—§ 295 (1) Power to Choose Officers and Admit New Members.—Like other corporations, savings banks and societies may choose their own officers and may admit new members.⁵⁶

§ 295 (2) Power to Contract in General.—It may be stated as a general rule that a savings bank is a corporation with limited powers. Its authority to contract is generally limited by its charter or by statute,⁵⁷ and it

ing in execution of the corporate power.—So held as to trustees qualified under the Ohio Statute, Act April 16, 1867. *Ridenour v. Mayo*, 40 O. St. 9.

52. Diligence and good faith required in selling property.—*Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

53. Method of determining liability.—*Leffman v. Flanigan* (Pa.), 5 Phila. 155.

54. Mode of enforcing liability—Indiana Statute construed.—The mode of winding up the affairs of savings banks and enforcing the liability of their trustees and officers for willful or fraudulent misconduct is prescribed by the Indiana Statute, Rev. St. 1881, § 2757, and that mode excludes all others, and those whose rights are involved must, through the proper officer of the state in that proceeding, find the means of enforcing the statutory liability against

delinquent officers and trustees. *Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214.

55. Prohibition against trustee becoming a surety—New York Statute construed.—A trustee of a savings bank, who, to make up a deficiency in its assets, caused by a loss on a loan made by it, executes a mortgage to a party that assigns the same to the bank, does not thereby become a surety or obligor for money loaned by the bank within the New York Statute, Laws 1875. c. 371, § 21, prohibiting a trustee from becoming such surety. *Best v. Thiel*, 79 N. Y. 15.

56. Power to choose officers and admit new members.—*Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907.

57. Limitations upon power to contract.—*Laidlaw v. Pacific Bank* (Cal.),

can not be held liable upon a contract that is ultra vires.⁵⁸ It may, however, be precluded, upon the principle of estoppel, from pleading that a contract into which it has entered is ultra vires.⁵⁹

§ 295 (3) Power to Acquire Property.—Acquisition of Title to Stock of Another Corporation.—A savings bank may acquire title to shares of stock of another corporation, where such stock is taken in compromise or discharge of debt of an insolvent debtor, where no circumstances casting suspicion on the transaction are shown.⁶⁰ After a savings bank

67 Pac. 897; Batchelder, etc., Co. v. Saco Sav. Bank (Me.), 79 Atl. 13.

Powers of savings banks under California Statutes.—Under the California Statute, Act April 11, 1862, § 10, providing that it shall be unlawful for a savings bank corporation or its directors to contract any debt or liability against the corporation for any purpose whatsoever, is to be construed in connection with the remainder of the act, which authorizes such corporation to purchase a lot and building for its business, and to employ and compensate help, and to incur other expenses, and in connection with the amendatory Act of March 12, 1864, conferring on such corporations power to do a commercial banking business, buying bonds, securities, etc., and hence the former act does not prevent the bank from incurring any liabilities whatsoever, but only those not authorized by the other legislation mentioned. Laidlaw v. Pacific Bank (Cal.), 67 Pac. 897.

58. Bank not liable upon a contract that is ultra vires.—A savings bank contracted with plaintiff to act as plaintiff's agent at a public sale to take notes of purchasers with approval security, and retain and collect such notes. Held, that since the contract was ultra vires of the bank, and beyond its apparent authority, it was not liable to plaintiff for loss resulting from the negligence of its agent in taking a note on which the indorsement was forged. Willett v. Farmers' Sav. Bank, 107 Iowa 69, 77 N. W. 519.

A savings bank incorporated for the purpose of receiving deposits, etc., with power to loan money, to discount in accordance with bank usages, and "to borrow money, buy and sell exchange, bullion, banknotes, government stocks, and other securities," has no power to deal in cotton futures, either as principal or agent; and, in an action by a broker to recover losses sustained upon transactions had through him in behalf of an undisclosed principal, the doctrine of ultra vires applies. Jemison v. Citizens' Sav. Bank, 122 N. Y. 135,

25 N. E. 264, 19 Am. St. Rep. 482, 9 L. R. A. 708, affirming 44 Hun 412.

Where an insolvent savings bank, in order to resume business, agreed to receive new deposits, to be used only in paying checks on the new accounts, such contract is ultra vires, and will not be enforced in equity, since, as such new deposits were intended for the purpose of making new discounts in the regular course of business, it would necessitate the payment of checks of the new depositors in the proceeds of maturing paper, which proceeds equitably belonged to old depositors. In re Mutual Bldg. Fund Soc., Fed. Cas. No. 9,976, 2 Hughes 374.

59. Estoppel to plead ultra vires.—Where the debt of a creditor of a bank is for money expended for its benefit and at its request, it will not be heard, in an action by the creditor to recover the money, to deny liability on the ground that it could not legally be bound by a contract to pay. Laidlaw v. Pacific Bank (Cal.), 67 Pac. 897.

Even if a savings bank has no authority to pay an attorney for examination of titles to securities offered for loans, where the attorney employed for that purpose has performed the services, it can not plead the invalidity of his employment to avoid paying him. Rebadow v. Buffalo Sav. Bank, 63 Misc. Rep. 407, 117 N. Y. S. 282.

When bank is not estopped to plead ultra vires.—In an action by a commission merchant against a savings bank to recover commissions and for money expended for speculating purposes at the bank's direction, the defendant is not estopped from pleading ultra vires, since the transaction was not only immoral, and in violation of the rights of stockholders and depositors, but the bank received nothing thereby. Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 19 Am. St. Rep. 482, 9 L. R. A. 708, affirming 44 Hun 412.

60. Acquisition of title to stock of another corporation.—Hill v. Shilling, 69 Neb. 152, 95 N. W. 24.

has acquired stock in another corporation in settlement of a debt, the bank becomes subject to any liability thereon, the same as other stockholders.⁶¹

§ 295 (4) Power to Sell Property.—A savings bank generally has the power to sell property owned by it, and this includes such incidental powers as are essential to make the sale advantageous.⁶² A savings bank owning stock in another corporation may sell, or employ a broker to sell on the stock exchange, such stock with the option in the seller to deliver the stock at any time within 60 days in pursuance of the contract, such contract not being ultra vires as a speculative contract.⁶³

§ 295 (5) Power to Borrow Money and Give Security.—A savings bank incorporated by special charter has the implied power of borrowing money required in the course of its business, and of making negotiable paper or a pledge of its securities as a means of borrowing.⁶⁴ By statute in some jurisdictions savings banks are expressly authorized to borrow money,⁶⁵ while in others the right to borrow for certain purposes is inhibited.⁶⁶ Where savings banks are prohibited by statute from borrowing money, but a loan is made to a savings bank and the indebtedness represented by a certificate of deposit, no recovery can be had upon the certificate itself.⁶⁷ A savings bank authorized by its charter to give security for public funds deposited with it, is not thereby empowered to become surety for a school treasurer on his official bond.⁶⁸ Upon the principle of estoppel depositors may be precluded from pleading that loans made to a savings bank were void, as being beyond the power of the corporation.⁶⁹

61. **Liability of bank acquiring stock in settlement of a debt.**—*Hill v. Shilling*, 69 Neb. 152, 95 N. W. 24.

62. **Power to sell and powers incident thereto.**—*Batchelder, etc., Co. v. Saco Sav. Bank (Me.)*, 79 Atl. 13.

It was not ultra vires for a savings bank, owning a hotel and wishing to sell it, to expend reasonable amounts to put it in condition to sell well, nor to agree with the intending purchaser to advance money to get the hotel opened and in running order, nor to issue a letter of credit to effect such purpose. *Batchelder, etc., Co. v. Saco Sav. Bank (Me.)*, 79 Atl. 13.

63. **Sale of stock held not a speculative contract.**—*Sistare v. Best*, 88 N. Y. 527, affirming 24 Hun 384.

64. **Implied power to borrow money and give security.**—*Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318.

65. **Statute authorizing banks to borrow money.**—Under the Ohio Statute, Rev. St., § 3256, providing that a corporation may borrow money and issue its notes or registered bonds therefor, a savings bank is authorized

to borrow money. *Dickason v. Grafton Sav. Bank Co.*, 27 O. C. C. 357.

66. **Borrowing money to pay a deposit inhibited.**—The California Statute, Act April 11, 1862, § 10, declares it unlawful to contract any debt or liability against a savings bank corporation for any purpose whatever, but its stock and assets shall be security to nonstockholding depositors. The act and Act March 12, 1864, amending it, give the corporation certain powers, but nowhere qualify the inhibition against incurring indebtedness, so as to allow it to borrow money to pay a deposit. Held, that a contract incurring such an indebtedness was ultra vires, and not enforceable as against nonstockholding depositors. *Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277.

67. **No recovery can be had on a certificate of deposit representing a loan.**—*Carroll v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500.

68. **Authority to give security for public funds deposited.**—*In re Miners' Bank (Pa.)*, 13 Wkly. Notes Cas. 370.

69. **Depositors estopped from plead-**

§ 295 (6) Power to Loan Money.—See post, “Loans and Discounts,” § 302 (3).

§ 296. Rules of Bank.—Reasonable rules, made by a savings bank pursuant to statute for the regulation of its business, should not be interfered with by the courts without substantial reason therefor.⁷⁰ Where new by-laws are adopted by a savings bank superseding the old ones, a provision contained in the old by-laws which is not contained in the new is no longer in force.⁷¹ Under the power conferred by statute on all corporations, of making by-laws for the management of their property and the regulation of their affairs, a savings bank may enact a by-law requiring its cashier to give bond for the faithful performance of the duties of his office.⁷² Where the duties of the president of a savings bank are defined by the by-laws, which also provide that such by-laws can only be amended after notice, a resolution enlarging the powers and duties of the president is void if no notice is given.⁷³

As to rules of bank as part of contract with depositor, see post, “Deposits,” § 298, and subsections.

§ 297. Representation of Bank by Officers and Agents—§ 297 (1) In General.—The powers which the executive officers of savings banks and like institutions have, merely by virtue of their offices, unen-

ing that loans were beyond power of bank.—A savings bank provided by its by-laws for three classes of depositors—weekly depositors, who were stockholders on the deposit of a minimum sum, special depositors, and irregular depositors. Plaintiff made a special deposit, receiving a certificate acknowledging receipt of the money on special deposit, at a specific rate of interest, if not drawn out within one year. Held, that the special deposit was, in effect, a loan, creating an indebtedness on the part of the bank; and the weekly depositors having, as stockholders, received benefits from the loans, in the way of increased dividends, they are estopped from pleading that such loans were void, as being beyond the power of the corporation. *Heironimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333.

70. Courts should not interfere with reasonable rules without substantial reason.—*Rosenthal v. Dollar Sav. Bank*, 61 Misc. Rep. 244, 113 N. Y. S. 787.

71. Effect of adoption of new by-laws.—Act April 11, 1862, § 10 (St. 1862, p. 201), provides that the capital stock of savings banks shall be a

security for nonstockholding depositors, and that the by-laws may extend the security to stockholding depositors also. Defendant's by-laws formerly extended the security. Thereafter a “committee on revision of by-laws reported.” The minutes recited that “the proposed new by-laws” were submitted; and subsequent minutes that “the same are hereby declared to be the by-laws.” The by-laws were set out in full in the minutes, and contained no provision making the capital stock a security to depositors, whether stockholders or not. Held, that the by-laws as adopted in the later meetings were new by-laws, and not mere amendments of the former by-laws, and hence the provision of the old by-laws extending the security to stockholding depositors was not continued in force. *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059.

72. Power conferred to enact by-law requiring cashier to give bond.—*Savings Bank v. Hunt*, 72 Mo. 597, 37 Am. Rep. 449, construing Wag. St. p. 289, § 1.

73. Provision requiring notice before amendment of by-laws.—*French v. O'Brien* (N. Y.), 52 How. Prac. 394.

larged by by-laws or by votes of the trustees, are very strictly limited.⁷⁴

§ 297 (2) President.—The president of a savings bank has authority to receive deposits, to issue certificates of deposit,⁷⁵ and to negotiate commercial paper with another bank.⁷⁶ Where directors of a savings bank, which holds shares of stock in another corporation as collateral security for a debt, authorizes the president to sell such shares for the best interest of the bank, the president has authority to employ a broker to sell the shares on the stock exchange.⁷⁷ The president is not, *virtute officii*, invested with the power of borrowing money in behalf of the bank,⁷⁸ nor has he authority, merely by virtue of his office, to represent the bank in such matters of business as may arise in connection with building loans.⁷⁹

§ 297 (3) Treasurer.—The treasurer of a savings bank has authority to extend a note from time to time by receiving interest in advance.⁸⁰

74. Powers of executive officers very strictly limited.—*Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

75. Authority to receive deposits and issue certificates of deposit.—Where a bank authorizes the establishment of a savings department, paying interest to depositors, and no particular official is charged with the management thereof, if the president holds himself out to others as in control thereof, and such others deposit their money with him as in charge of such savings department, the bank is liable therefor. *Bickley v. Commercial Bank*, 43 S. C. 528, 21 S. E. 886.

In an action against a savings bank to recover a deposit, instructions that a savings bank is liable on a certificate of deposit if the bank actually received the money represented by such certificate, but that no officer of a savings bank has authority to issue a certificate of deposit except where the bank actually receives the money or other valuable consideration, and that if the certificate sued on was issued by the bank president in payment of a personal indebtedness, and the bank did not receive any valuable consideration, the verdict should be for defendant, are improper, as the failure of a bank officer to pay over to the bank money or credits received at its usual place of business is one for which the bank is responsible. *Scow v. Farmers', etc., Sav. Bank*, 136 Iowa 1, 111 N. W. 32.

76. Authority to negotiate commercial paper with another bank.—Where a savings bank clothes its president, who is its chief executive officer, with apparent authority to represent it in

transacting business appropriate to the proper discharge of its corporate functions, it is bound by his dealings in negotiating commercial paper with another bank, though he appropriated the proceeds to his own use, where the other bank was acting in good faith and without notice of his want of fidelity in the discharge of his duties, since, where one of two innocent persons must suffer through the misfeasance of an agent of one, the one who has placed the agent in a position to perpetrate the fraud must suffer. *Carroll v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937.

77. Authority in relation to sale of stock held as collateral security.—*Sistare v. Best*, 88 N. Y. 527, affirming 24 Hun 384.

In such case, the president has authority to employ a broker to sell the shares on the stock exchange, though the resolution of the directors directed that the stock should be sold in such form as would protect the bank in its claim against the pledgor, it being presumed, in the absence of evidence, that the terms of the pledge authorized such sale, and that the bank was fully protected from any claim against it by the pledgor. *Sistare v. Best*, 88 N. Y. 527, affirming 24 Hun 384.

78. No authority to borrow money.—*Fifth Ward Sav. Bank v. First Nat. Bank*, 47 N. J. L. 357, 1 Atl. 478.

79. No authority to represent bank in matters connected with building loans.—*Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

80. Authority to extend a note by receiving interest in advance.—*New*

The treasurer also has power to collect the debts of the bank, and can, under orders of the board of investment, execute the power of sale of a mortgage to the bank, by conveying to the purchaser; and the bank's acceptance of the purchaser's deed of release ratifies its treasurer's act.⁸¹ The presumption is that the treasurer has authority, in behalf of the bank, to take possession of land on which the bank holds a mortgage, for the purpose of gathering growing crops.⁸² The treasurer has authority to pay off a mortgage indebtedness assumed by the bank.⁸³ If the trustees pass a vote authorizing the treasurer to assign mortgages held by the bank, such vote is not ultra vires as to a person who, in good faith and for a valuable consideration, takes an assignment of a mortgage from the treasurer.⁸⁴ But the fact that the treasurer by verbal consent, and under direction of the investment committee, has assigned mortgages relating to other estates, does not give him a general authority to assign mortgages, or entitle the assignee to infer that he has such authority.⁸⁵ If an assignment by the treasurer is defectively executed a court of equity may correct it.⁸⁶ The treasurer is

Hampshire Sav. Bank v. Ela, 11 N. H. 335.

Where the treasurer thus extends a note, the effect of the extension in releasing the surety on the note can not be avoided by the bank, notwithstanding the officer had no authority to discharge the surety. *New Hampshire Sav. Bank v. Ela*, 11 N. H. 335.

81. Authority to collect debts and execute power of sale in mortgage to bank.—*North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335, 37 N. E. 307.

82. Authority to take possession of land on which bank holds mortgage.—*Bangor Sav. Bank v. Wallace*, 87 Me. 28, 32 Atl. 716.

83. Authority to pay off mortgage indebtedness assumed by bank.—Complainant was to pay an incumbrance on property conveyed to him. He subsequently executed to the grantor a mortgage of the property, with a verbal agreement that the amount paid by him on the prior incumbrance was to be deducted from the amount due on the mortgage. He arranged with a bank for a loan on the property, whereby it was agreed that the bank should pay off all prior incumbrances, making its mortgage a first lien. The bank, through its treasurer, paid the grantor's mortgage, without making any deduction for the prior incumbrance. The treasurer, subsequently learning that a mistake had been made, continued to receive payments from complainant without giving him notice, and leaving him to suppose that he was paying the full interest on all mortgage debts on his property, until

the grantor became insolvent, whereby he lost his chances for recovery against him. Held that, as the treasurer was acting in the line of his employment, complainant was entitled to an allowance, on an accounting between him and the bank, for the amount so lost through the treasurer's neglect. *Sherry v. Wakefield Inst.*, 21 R. I. 162, 42 Atl. 268.

84. Authority to assign mortgages.—*Commonwealth v. Reading Sav. Bank*, 137 Mass. 431.

Where the treasurer of a savings bank, having the authority to do so, executed an assignment of a mortgage in the name of the bank, and indorsed the note to a bona fide purchaser, the title passes, notwithstanding he perpetrated a fraud on the bank and converted the purchase money to his own use. *Whiting v. Wellington*, 10 Fed. 810.

85. *Holden v. Phelps*, 135 Mass. 61.

86. Correction of defective assignment.—An assignment of a mortgage held by an incorporated savings bank purported to be the deed of the bank and to assign "the mortgage deed, the real estate thereby conveyed, and the note and claim thereby secured." It was signed in the name of the bank by A. B., treasurer. The in testimony clause read: "In witness whereof, I, A. B., treasurer of said corporation, have hereunto set my hand and seal." The promissory note which the mortgage was given to secure was indorsed: "A. B., treasurer." Held that, if the assignment was so defectively executed as not to transfer

not, *virtute officii*, invested with the power of borrowing money for the bank, and pledging its securities as collateral.⁸⁷ Nor has he, by virtue of his office merely, implied authority to transfer to a purchaser a promissory note belonging to the bank,⁸⁸ or to bind the bank by indorsing the name of the corporation on a promissory note.⁸⁹ But his authority to indorse a note for the bank may be inferred from the conduct of the trustees, without any express direction or vote.⁹⁰ Such authority is not conferred by a vote of the corporation to sell notes held by it.⁹¹ Nor is it conferred by a provision in the by-laws that the treasurer "shall draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding upon the corporation."⁹² The treasurer of a co-operative bank has no power to bind it by acceptance of an order drawn on it.⁹³ The treasurer

the mortgage and land, the note and claim thereby secured passed, and that a court of equity would correct the assignment and treat the mortgage as transferred with the debt. *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431.

87. No authority to borrow money and pledge securities.—*Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318.

The treasurer of a savings bank can not, by virtue of his general powers, nor by virtue of a clause in the by-laws providing that "he shall draw all necessary papers and discharge all obligations of the corporation, and his signature shall be binding on the corporation," bind the corporation to repay sums of money borrowed by him, and diverted to his own use, by transferring forged, fictitious, or paid-up books of deposit, pretended by him to represent sums actually due from the bank. *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16, 43 Am. Rep. 495.

A treasurer of a savings bank, without authority, signed two notes of his bank as treasurer, and discounted them at another bank, and also, without authority, pledged certain coupon bonds payable to bearer, belonging to his bank, as collateral security for the advance, which was not received by the bank, but converted by the treasurer. Held, that the bank discounting the notes dealt with the treasurer as one whose authority was defined by the charter of his bank, and by common usage, and assumed the risk, should the pledge prove unauthorized. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318.

A savings institute at Fishkill conducted its business through a bank,

whose cashier, B., was treasurer of the institute, and active manager of both. Without the knowledge or consent of the other officers of the bank, B. took from a safe-deposit company in New York certain securities of the institute, and pledged them to secure a loan for the bank. Held, that the institute was entitled to recover for the conversion. *Fishkill Sav. Inst. v. Bostwick*, 19 Hun 354.

88. No authority to transfer note belonging to bank.—*Holden v. Upton*, 134 Mass. 177.

89. No authority to indorse note.—*Bradlee v. Warren, etc.*, Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351.

90. Authority to indorse note may be inferred from conduct of trustees.—*Chase v. Hathorn*, 61 Me. 505.

91. Authority to indorse a note not conferred by vote to sell notes.—*Bradlee v. Warren, etc.*, Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351.

92. Provision in by-laws not conferring authority to indorse note.—*Bradlee v. Warren, etc.*, Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351.

93. No power to bind bank by acceptance of an order drawn on it.—*Jewett v. West Somerville Co-Operative Bank*, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259.

Such power is not conferred by the Massachusetts Statute (Pub. St., c. 117, § 17), providing that "all payments made by the corporation for any purpose whatsoever, shall be by order, check or draft upon the treasurer, signed by the treasurer and secretary," and that the "treasurer shall dispose of and secure the safe-keeping of all moneys, securities and property of the corporation in the manner designated by the by-laws," where there is no authority therefor in the by-laws. *Jewett*

of an incorporated institution for savings has no authority, as such, and without being specially authorized, to execute a release in the name of the corporation.⁹⁴ In the absence of authority other than that which may be inferred from his office, the treasurer of a savings bank can not bind the bank by a contract incidental to a building loan made by the bank.⁹⁵

§ 297 (4) Cashier.—The cashier of a savings bank has authority to receive a bond on deposit.⁹⁶ Where the charter of a savings bank provides what shall be requisite to authorize a transfer of securities, such a transfer by the cashier without the required authority is not binding on the bank.⁹⁷

§ 297 (5) Clerk.—A savings bank clerk, to whom authority is not given to make agreements outside the usual course of business of the bank, can not bind the bank by an agreement that a deposit shall be withdrawn only when the depositor and two certain persons are present.⁹⁸

§ 297 (6) Estoppel of Bank to Deny Authority.—A savings bank

v. West Somerville Co-Operative Bank, 173 Mass. 54, 52 N. E. 1085. 73 Am. St. Rep. 259.

94. No authority to execute a release.—*Dedham Inst. v. Slack* (Mass.), 6 Cush. 408.

Acts not amounting to ratification of release.—Where the treasurer of an institution for savings became a party to an assignment for the benefit of creditors, and thereby undertook to release one of the promisors on a joint and several note belonging to the institution, but without any authority, either general or special, for that purpose, and payments of dividends were subsequently made to the treasurer's successor in office, and indorsed on the note, and entered in the books of the institution as so much received of the assignees of such promisor, and the treasurer's accounts and cash, including the sum so received, and the notes of the institution, including the note in question, were subsequently examined by a committee and certified as correct, it was held that these acts did not amount to a ratification of the release. *Dedham Inst. v. Slack* (Mass.), 6 Cush. 408.

95. No authority to bind by contract incidental to a building loan.—*Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

96. Authority to receive a bond on deposit.—The plaintiff's husband deposited at her request, in a savings bank, a bond belonging to her. The cashier of the bank placed the bond in the bank safe, and returned the

plaintiff's bank book to the husband, with the following entry: "Mrs. A. Z., Bond, \$1,000 [with description of the bond and date of entry]." Held, that the bank could not deny that the cashier took the bond in behalf of the bank, and as the bond of the plaintiff. *Zeugner v. Best*, 44 N. Y. Super. Ct. 393.

97. Transfer of securities without authority required by charter.—The charter of a savings bank provided that five of the trustees should form a quorum, and that the affirmative vote of at least five should be requisite to authorize a sale or to transfer security. The cashier of the bank gave to A. certain securities, on an agreement that A. should pay certain indebtedness of the bank, which was pressing. This transfer was not authorized by the trustees. A. paid the indebtedness, leaving the securities in the bank, which subsequently failed, when A. brought suit against the assignee to recover possession of the securities. Judgment for the defendant, upon the ground that the cashier had no authority to transfer the securities without the affirmative vote of at least five trustees, affirmed; the court holding that transactions of savings banks are governed by different rules, with regard to the powers of cashiers, than those of banks of discount. *Zimmerman v. Miller*, 2 Pa. 226.

98. No authority to bind bank by agreement as to withdrawal of deposit.—*Riley v. Albany Sav. Bank* (N. Y.), 36 Hun 513, affirmed in 103 N. Y. 669.

may, upon the principle of estoppel, be precluded from denying the authority of an officer or agent to act for it.⁹⁹

§ 298. Deposits—§ 299. — In General.—Right to Make Deposits.—Money in limited amounts may be deposited in savings banks for safe-keeping and be withdrawn at the pleasure of the owner, under such regulations as the charter and by-laws may prescribe.¹

Nature of Relation Existing between Bank and Depositor.—According to the weight of authority, if there is no by-law or regulation limiting the liability of a savings bank,² and no agreement to the contrary,³ the deposit of money in the bank creates the relation of debtor and creditor between the depositor and the bank.⁴ The money deposited becomes the property of the bank,⁵ which is under obligation to pay, on demand, not the

99. Estoppel to deny authority of treasurer to assign a mortgage.—A by-law of a savings bank provided that the record, which it was the duty of the secretary and treasurer to keep, should "be held in proof of the votes and transactions of the corporation." The treasurer was authorized by vote to discharge and release mortgages, and he fraudulently altered the record so that it purported to give him authority to assign them also. Held, that the bank was liable for his act in assigning a mortgage, the assignee taking for value in good faith, and in reliance on the record. *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431.

Transfer of stock by treasurer—Estoppel to assume inconsistent attitude.—A savings bank treasurer caused certificates of stock belonging to the bank to be transferred to A. and new certificates issued. On the strength of these, he borrowed, in the name of the bank, money from A., which he converted. Held, that the bank could not deny the validity of the transfer and at the same time claim the stock. *Holden v. Metropolitan Nat. Bank*, 138 Mass. 48.

No estoppel to deny liability for materials purchased.—Where the president and treasurer of a savings bank made a building loan, took a mortgage on the premises, and retained the proceeds to pay for the materials which it was agreed the bank should purchase at the mortgagor's direction for the completion of the building, it was held that the bank was not estopped to deny its liability for materials so purchased and used, as the building in which the material was used was not one owned by the bank, and the transaction was so far out of

the ordinary business of the bank that plaintiff was put on inquiry. *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

1. Right to make deposits.—*Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907.

2. Nature of relation existing between bank and depositor.—*Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016.

3. Ide v. Pierce, 134 Mass. 260; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781; *Zinn v. Mendel*, 9 W. Va. 580.

4. Illinois.—*Ward v. Johnson*, 5 Ill. App. 30.

Maine.—*Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016.

Massachusetts.—*Ide v. Pierce*, 134 Mass. 260.

New Jersey.—*Schippers v. Kempfhes* (N. J.), 67 Atl. 1042, affirmed in 72 N. J. Eq. 948, 73 Atl. 1118.

New York.—*Crosby v. Bowery Sav. Bank*, 67 How. Prac. 329, 50 N. Y. Super. Ct. 453; *People v. Mechanics'*, etc., Sav. Inst., 92 N. Y. 7.

Vermont.—*Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781.

West Virginia.—*Zinn v. Mendel*, 9 W. Va. 580.

Depositors in savings banks organized under state laws are creditors of the bank, and have the same rights as depositors in other banks. *Robinson v. Aird*, 29 So. 633, 43 Fla. 30.

5. Ide v. Pierce, 134 Mass. 260; *Crosby v. Bowery Sav. Bank*, 67 How. Prac. 329, 50 N. Y. Super. Ct. 453; *People v. Mechanics'*, etc., Sav. Inst., 92 N. Y. 7; *Pope v. Burlington Sav.*

identical money received, but a sum equal in legal value.⁶ Depositors are not, as such, stockholders of the bank;⁷ and the better opinion seems to be that there is nothing like a private trust between the corporation or its trustees and the depositors, in respect to the depositors,⁸ and that a trust relation is not created by making a deposit in another person's name, or by making it payable to another's order.⁹ But in some jurisdictions it has been held that a trust relation exists between the bank and its depositors.¹⁰

Depositor's Claim against Bank a Chose in Action.—The claim of a depositor against a savings bank for his deposit is a chose in action, and not a bailment.¹¹

Special Deposits Defined.—Special deposits in a savings bank, not made as savings-bank deposits, nor drawing interest or dividends, and which

Bank, 56 Vt. 284, 48 Am. Rep. 781; *Zinn v. Mendel*, 9 W. Va. 580.

The fund arising from the savings deposits are the property of the bank, so that it has full power to negotiate or pledge any of its securities obtained by loaning said funds. *Ward v. Johnson*, 5 Ill. App. 30.

6. *Zinn v. Mendel*, 9 W. Va. 580.

But it seems this rule does not apply where the thing deposited is not money but a commodity. *Zinn v. Mendel*, 9 W. Va. 580.

7. *Savings Bank v. New London*, 20 Conn. 111.

But in New Jersey it has been held that depositors are in the nature of partners or stockholders. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

And in New Hampshire, the relation, of a depositor to the bank has been held not to be that of a mere creditor, but more analogous to that of stockholders in banks of discount, or even in business corporations. *Mann v. State Treasurer* (N. H.), 68 Atl. 130.

8. *People v. Mechanics*, etc., Sav. Inst., 92 N. Y. 7; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781.

9. *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781.

B. deposited money in defendant savings bank in the name of A., but payable to himself, and kept the deposit book. After having withdrawn more than half the money, he directed the treasurer to change the entry by adding after the words, "payable to B.," "during his life, and, after his death, to A." In his will, previously made, he confirmed all gifts made or to be made to his children. There was no other evidence of any trust. The deposit could not be withdrawn with-

out the production of the book. A. had no knowledge of the transaction. Held, that the bank did not hold the money as trustee for A. *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781.

10. An incorporated savings institution, founded merely for investment of money and payment of income, is a trustee, and subject, as such, to equitable control. Chancery may interfere to regulate distribution of its assets. In re *Newark Sav. Inst.*, 28 N. J. Eq. 552.

But the relation of a savings bank to its depositors is a trust defined by its act of incorporation, and a court of chancery has not the power, by virtue of its general jurisdiction over trusts, to make orders changing the constitution and terms of such trusts as established by the legislature. *Dodd v. Una*, 40 N. J. Eq. 672, 5 Atl. 155.

The depositors in a savings bank do not personally loan the money deposited, but intrust it to the bank as their trustee to be kept, invested, managed, and paid out, according to the provisions of the charter and by-laws of the bank, and where there is a loss they share it according to the amount of their deposits. *State v. People's Nat. Bank*, 75 N. H. 27, 70 Atl. 542.

The depositors in a savings institution occupy a double relation to the corporation as such. In case of insolvency, they are its creditors; in other cases, they are in the nature of partners or stockholders; but in all cases they are the *cestuis que trustent* of the managers. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543, affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

11. **Depositor's claim against bank a chose in action.**—*Lund v. Seaman's Bank* (N. Y.), 37 Barb. 129.

go into the general funds of the bank, are in the nature of loans, the true relation between the depositors and the bank being that of debtor and creditor, and are not subject to losses, as general deposits, so long as the assets are sufficient to pay the bank's debts.¹²

What Deposits May Be Received.—Under a statute providing that savings banks may receive on deposit the savings and funds of others, preserve and invest the same, and transact the usual business of such institutions, a savings bank has power to receive a special deposit of securities for safe-keeping.¹³

Statute Requiring Pledge of Capital Stock and Property for Security of Depositors.—A statute authorizing a corporation to establish a savings department, requiring such company to pledge its entire capital stock and property for the payment of the depositors, and providing that deposits may be received after such pledge, does not, of itself, create a lien on such capital stock and property, since it authorizes and requires the company so to do, and contemplates the security of deposits before the receipt of deposits.¹⁴

§ 300. — By-Laws, Rules or Pass Books as Part of Contract.

—Reasonable by-laws of a savings bank are a part of the contract between

12. Special deposits defined.—*Abbott v. Wolfeborough Sav. Bank*, 68 N. H. 290, 38 Atl. 1050.

In New York it has been held that a savings bank that pays nothing for the money it receives, and agrees to repay the same to the depositor personally, or to his order, upon the production of a book which is delivered to him, crediting him with the amount, holds the money as the agent or the bailee of the depositor, under a personal contract to restore it, or its amount. *Lund v. Seaman's Bank* (N. Y.), 20 How. Prac. 461

13. Special deposit of securities for safe-keeping—Statute construed.—*Sherwood v. Home Sav. Bank*, 131 Iowa 528, 109 N. W. 9, construing Iowa Code, § 1841.

14. Statute requiring pledge of capital stock and property for security of depositors.—*Newton v. Eagle, etc., Mfg. Co.*, 101 Fed. 149, constructing a Georgia Statute, Act Feb. 17, 1873.

A resolution of the stockholders authorizing the directors to put into operation a savings department, and action by the directors thereunder, declaring the entire property of the company pledged for the payment of depositors, were not a full compliance with the authority and requirements of such statute, since the statute contemplates a mortgage on such stock and property. *Newton v. Eagle, etc.,*

Mfg. Co., 101 Fed. 149.

Such action of the stockholders and directors constituted an equitable lien upon such property in favor of depositors, or those who became depositors, in such savings department, though no particular person was named, enforceable against the company and others with notice. *Newton v. Eagle, etc., Mfg. Co.*, 101 Fed. 149.

A deed of trust conveyed the real and personal property of the corporation to secure payment of bonds issued to pay depositors in its savings department. Such deed recited the statute above referred to, Act Ga. Feb. 17, 1873, authorizing and requiring such corporation to pledge its capital stock and property for the payment of such depositors; that large deposits had been received; that such company had not made any pledge of its capital stock or property for payment of depositors, nor created any lien or mortgage of any kind on its property. Held, that notice of an equitable lien existing on the capital stock and property of such corporation by reason of a pledge of such property declared by the directors under authority of a stockholders' resolution, and in pursuance of such act, can not be implied from knowledge of the contents of such deed and bonds. *Newton v. Eagle, etc., Mfg. Co.*, 101 Fed. 149.

the bank and a depositor when brought to the notice of the latter.¹⁵ A depositor is bound by the reasonable rules of the bank to which he assents by an agreement in writing.¹⁶ He is also bound by a rule of the bank adopted under statutory authority, and of which he has knowledge.¹⁷ The adoption of rules and regulations which affect the contractual relations between a savings bank and its depositors may be shown by their long use, with the knowledge and approval of the trustees, as well as by record of a formal vote.¹⁸ The signature of a depositor thereto is not the only way to show his agreement to be bound by the regulations of a savings bank, but the agreement may be evidenced by his conduct.¹⁹ By-laws, rules and regulations printed in a passbook given to a depositor and accepted by him, become a part of the contract between him and the bank.²⁰ Though the by-

15. By-laws of a savings bank requiring the presentation of the deposit book or notice to the bank in case of loss, as conditions precedent to payment to the depositor or on his order, are reasonable and are a part of the contract when brought to the notice of the depositor. *Hough Ave., etc., Banking Co. v. Anderson*, 78 O. St. 341, 85 N. E. 498.

16. Depositor bound by reasonable rules to which he assents in writing.—*Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

17. Depositor having knowledge of rule adopted under statutory authority, bound thereby.—*Campbell v. Schenectady Sav. Bank*, 114 App. Div. 337, 99 N. Y. S. 927.

18. How adoption of rules and regulations may be shown.—*Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

19. How agreement to be bound by regulations may be shown.—*Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

20. By-laws, rules and regulations printed in passbook.—*Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329; *Cosgrove v. Provident Inst.*, 64 N. J. L. 653, 46 Atl. 617, reversing 64 N. J. L. 39, 44 Atl. 936; *Wall v. Provident Inst. (Mass.)*, 3 Allen 96; *S. C.*, 6 Allen 320; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Warhus v. Bowery Sav. Bank*, 12 N. Y. Super. Ct. 67, affirmed in 21 N. Y. 543; *Kelley v. Chenango Valley Sav. Bank*, 22 App. Div. 202, 47 N. Y. S. 1041, reversing 21 Misc. Rep. 240, 45 N. Y. S. 651; *Ferguson v. Harlem Sav. Bank*, 43 Misc. Rep. 10, 85 N. Y. S. 825; *Mitchell v. Home Sav. Bank (N. Y.)*, 38 Hun 255.

A depositor in a savings bank, who accepted from the bank and used a deposit book containing printed regulations relating to the liability of the bank for the payment of the deposit to others than the depositor, assented to the regulations, which became binding on both the bank and the depositor. *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

The by-laws of a bank provided that all money should be deposited in its name, and all deposits should be entered in a book of the corporation, and a duplicate furnished each depositor, which should be his or her voucher, and evidence of property in such institution, and that the depositor should be bound by the by-laws and rules of the corporation on receiving a book in which the same were printed. Held, that plaintiff, having had due notice of these by-laws, which were printed in the deposit book which he held, could not recover for money deposited with the bank's treasurer, where plaintiff had changed his regular deposit book for one which did not bear the bank's name or its by-laws, but bore the name of a bank doing business in the same room, upon a representation by the treasurer, who was also cashier of such other bank, that a greater rate of interest would be paid; the money never having been received by the bank or credited on its books, but having been converted by the treasurer. *Kelley v. Chenango Valley Sav. Bank*, 22 App. Div. 202, 47 N. Y. S. 1041, reversing 21 Misc. Rep. 240, 45 N. Y. S. 651.

Signing agreement to be bound by by-laws printed in deposit book.—Where a depositor, on making his first deposit in a savings bank, signed an agreement to be bound by the by-laws

laws of a savings bank require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent may be implied, and will be where a depositor living at a distance, and receiving a deposit book by mail with the by-laws printed in it, leaves the deposit, and keeps the book for several years, without going to the bank, and leaving his signature.²¹ Where no notice is given to a depositor in a savings bank of a change in its by-laws, and the depositor has no knowledge of any change, all deposits made after such change must be taken to have been made under the original contract.²² The authority to make changes in its by-laws does not empower a bank to change, without the consent of a depositor, a contract made with such depositor, nor to discharge the debt to the depositor by payment to a stranger.²³ A rule of a savings bank forbidding any gift of a deposit, except by an assignment in writing, duly acknowledged, does not bind one who became a depositor before the rule was made, though he had agreed that notices as to deposits should be deemed and taken as personal notices, and though the rule had been posted in the bank for many years before his death.²⁴

§ 301. — Title to and Disposition of Deposits—§ 301 (2) To Whom Payments to Be Made.—By-Laws and Rules of Bank Regulating Payments.—The person or persons to whom money deposited in a savings bank will be paid and the methods of its withdrawal are matters that are generally regulated by the by-laws and rules of the bank. The validity

printed in the deposit book then given him, such by-laws governed the rights of the parties, as a material part of the contract of deposit. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700.

21. Effect of by-law requiring depositors to subscribe their names in a book.—*Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794, 25 Am. St. Rep. 744.

22. Change in by-laws without notice to depositor.—*Kimins v. Boston, etc., Sav. Bank*, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441.

Where the plaintiff deposited money in a savings bank, and the by-laws then in force provided that money should be paid only in a certain manner, and subsequently, without the plaintiff's knowledge, and without notice to her, the by-laws were amended, making money payable in a different manner, and in consequence of such change the money deposited by her was drawn from the bank by a third person on forged orders, held that the bank was liable for the amount of the deposits so withdrawn, and that plaintiff was not affected by the passage of such by-laws. *Kimins v. Boston, etc.,*

Sav. Bank, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441.

Where a depositor in a savings bank signs a deposit book assenting to the by-laws then in force, and "to those which may be thereafter made pursuant to the power granted in the third article," providing for further by-laws or alterations of those already made, and that "all such by-laws and alterations shall be equally binding on all depositors as those by them subscribed, after the same shall have been duly made known," a by-law adopted after the deposit was made, and not made or attempted to be made known to the depositor, binds neither the depositor, nor any one representing him, nor his estate. *Hudson v. Roxbury Inst.*, 176 Mass. 522, 57 N. E. 1021.

23. Authority to change by-laws does not authorize change without depositor's consent.—*Kimins v. Boston, etc., Sav. Bank*, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441, construing Mass. Pub. St. ch. 116, § 29.

24. Rule forbidding gift of deposit except by written assignment duly acknowledged.—*Ranney v. Bowery Sav. Bank*, 39 Misc. Rep. 301, 79 N. Y. S. 487.

of some of these by-laws and rules has been sustained by the courts.²⁵ In a suit against a bank for its refusal to pay a deposit the right to set up the defense that the plaintiff had not complied with the by-laws may be lost by waiver.²⁶

Money Deposited to Credit of Husband and Wife.—Money deposited in a savings bank to the joint credit of a man and his wife is presumed to belong one-half to each of them.²⁷ The mere fact that a savings bank book is made out in the name of "J. or wife, B.," does not prove ownership of J. in the deposit, but simply evidences a purpose that the money may be drawn out by either of the persons named.²⁸

When Bank Authorized to Pay Wife from Husband's Deposit.—A bank is authorized to pay to a wife money from her husband's account if the husband actually authorized the wife to present his bank book and draw the money, or if the bank had the right to assume that he had authorized her to do so from their course of business and other attending circumstances.²⁹

25. By-law excluding all other methods of withdrawing deposit but that prescribed.—A by-law of a savings bank, to the effect that money might be drawn personally, or on the written order of the depositor or his attorney, when accompanied by the "passbook," excludes by implication all other methods of withdrawing the deposit. *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653.

The rule providing that payment to a person presenting a passbook shall be good on account of the owner unless the passbook has been lost and notice in writing given the bank before payment is made is binding on depositors in savings banks. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

A rule of a savings bank, stipulating that a payment to a party presenting a passbook shall be a valid payment of the deposit, adopted under the New York Statute, Bank Law, Laws 1892, p. 1895, c. 689, § 113, providing that sums deposited with a savings bank shall be repaid to the depositor in such manner and at such times and under such regulations as the trustees shall prescribe, etc., and known to a depositor, is a part of the contract between the bank and the depositor. *Campbell v. Schenectady Sav. Bank*, 114 App. Div. 337, 99 N. Y. S. 927.

Where a by-law of a savings bank provides that deposits may be withdrawn by the depositor, or one au-

thorized by him, on producing the original deposit book, one depositing money in a bank in the name of another thereby constitutes the bank a trustee for the use of the latter. *Blasdel v. Locke*, 52 N. H. 238.

26. Defense that plaintiff had not complied with by-laws lost by waiver.—Where a depositor in a savings bank is a nonresident and places the collection of her accounts in the hands of an attorney, who presents the passbook and demands of the bank's officers the payment of the balance shown therein, the rules of the bank allowing it to pay out deposits to any one holding the passbook, and the officers inform the attorney that they will not pay the interest claimed but will look into the question of paying the principal, in a suit against the bank it can not set up as a defense that the attorney had not complied with the by-laws by showing written authority from his client to collect what was due her. This objection not having been made at the time of the demand was waived. See *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Atlanta, etc., Banking Co. v. Close*, 115 Ga. 939, 42 S. E. 265.

27. Money deposited to joint credit of husband and wife.—In *re Brooks*, 5 Dem. Sur. 326, 5 N. Y. St. Rep. 381.

28. Bank book made out in name of "J. or wife B."—*Burke v. Slaterry*, 10 Misc. Rep. 754, 21 N. Y. S. 825, 64 N. Y. St. Rep. 631.

29. When bank authorized to pay wife from husband's deposit.—*Moline*

Money Deposited in Name of a Minor.—A statute which provides that money deposited in a savings bank in the name of a minor may be paid to the person making the deposit, does not validate the payment, by the bank to a father, of deposits standing in the name of his minor child, and made partly by the minor and partly by the father, except as to the amount deposited by the father.³⁰

Payment without Knowledge of Insanity of Depositor.—Where a savings bank pays a deposit without knowledge of the insanity of the depositor, and without knowledge of facts which should charge it with knowledge, it is protected in making payment.³¹

Deposit by a Treasurer in His Own Name.—A treasurer of a committee, who deposited in his own name a fund appropriated for a particular purpose, and which the bank paid to a new treasurer, appointed by the committee to receive it, can not recover the same of the bank.³²

Disposition of Deposits Where Depositor Can Not Be Found.—In some states provision is made by statute for the disposition of deposits where the claimant is unknown or the depositor can not be found.³³

§ 301 (3) Negligence in Paying to Wrong Person.—As to negligence in paying to one wrongfully in possession of pass book, see post, "Payment to One Wrongfully in Possession of Pass Book," § 301 (4).
 *Officers of savings banks in making payments upon account of deposits, are required to act in good faith,³⁴ and to exercise reasonable care and diligence to avoid payment to a person who is not lawfully entitled to receive it,³⁵

State Sav. Bank v. Liggett, 106 Ill. App. 223.

Therefore, on an action by a husband against a bank for money paid to his wife from his account, an instruction to the jury that, unless they found that defendant had shown, by a preponderance of the evidence, that plaintiff intended to authorize his wife to present his bank book and draw his money, they should find the issues for the plaintiff, is erroneous. The question is, not what plaintiff intended to authorize his wife to do, but what he either actually authorized her to do, or what defendant had the right to assume he had authorized her to do. *Moline State Sav. Bank v. Liggett*, 106 Ill. App. 223.

30. Money deposited in name of a minor—Statute construed.—*Dickinson v. Leominster Sav. Bank*, 152 Mass. 49, 25 N. E. 12, construing Pub. Stat., ch. 116, § 29.

31. Payment without knowledge of insanity of depositor.—*Riley v. Albany Sav. Bank (N. Y.)*, 36 Hun 513, affirmed in 103 N. Y. 669.

32. Deposit by a treasurer in his own name.—*Tay v. Concord Sav. Bank*, 60 N. H. 277

33. Statute held not unconstitutional.—The Massachusetts Statute, Laws Mass. 1907, c. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor can not be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representative, is not unconstitutional. *Provident Inst. v. Malone*, 221 U. S. 660, 55 L. Ed. 899, 31 S. Ct. 661, affirming judgment, *Attorney General v. Provident Inst.*, 201 Mass. 23, 86 N. E. 912.

34. Officers of bank required to act in good faith.—*Hough Ave. Sav., etc., Co. v. Anderson*, 78 O. St. 341.

35. Officers of bank required to exercise reasonable care and diligence.—*Sullivan v. Lewiston Inst.*, 56 Me. 507, 96 Am. Dec. 500; *Hough Ave. Sav., etc., Co. v. Anderson*, 78 O. St. 341.

Jury warranted in finding that proper diligence was not used.—Where deposit made by a wife in a savings bank is marked "Special," and she testifies that she told the officer to pay it to no one but herself, the fact that the bank subsequently paid the money to her husband, who was with-

and if they fail to do so the bank will be liable to pay again to the rightful owner of the deposit.³⁶ If using such care and diligence, but lacking present means of identifying the claimant of the deposit, the officers make a payment upon presentation of the book to one apparently in the lawful possession of it as owner, the true depositor is bound by the payment.³⁷ But pay-

out authority from her, merely upon his presenting her passbook with the assurance that he was her authorized agent, is sufficient to warrant the jury in finding that proper diligence was not used by the bank in protecting her interests. *Clark v. Saugerties Sav. Bank*, 62 Hun 346, 17 N. Y. S. 215, 42 N. Y. St. Rep. 285.

Facts held insufficient to show negligence.—A rule of a savings bank provided that payments made to persons presenting a passbook should be deemed valid payments of the deposit. A depositor had knowledge of the rule. She went to the bank, accompanied by a niece, and drew out two sums. Her checks were signed by her making a mark, witnessed by her niece. Subsequently she gave her passbook to her attorney, who delivered the same to the niece, who presented the passbook to the bank, and checks purporting to have been signed by the depositor, and obtained money on them. When the first check was presented by the niece, reference was made to the signature book and to the former checks, and she was then asked if she saw plaintiff sign the check, and she replied that she did. The first money drawn by the depositor was about fourteen months after her first deposit, and the second check was drawn about fourteen months thereafter. The checks drawn by the niece were drawn in six months. Held insufficient to show negligence on the part of the bank, so as to make it liable to the depositor for the money paid. *Campbell v. Schenectady Sav. Bank*, 114 App. Div. 337, 99 N. Y. S. 927.

36. Liability of bank where officers fail in their duty.—*Hough Ave. Sav., etc., Co. v. Anderson*, 78 O. St. 341; *Sullivan v. Lewiston Inst.*, 56 Me. 507, 96 Am. Dec. 500.

Where a savings bank failed to make a physical comparison of a purported signature to a draft with the signature of the depositor on file in the bank, and in point of fact the signature was a forgery, the bank is liable for such payment, for failure to exercise due care and ordinary caution. Judgment, 88 App. Div. 374, 84 N. Y. S. 642, reversed. *Kelley v. Buffalo Sav. Bank*,

180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720.

A person who presented a passbook at a bank failed to make a mark similar to that of the depositor, who was illiterate, but answered correctly questions as to his age, parents, and nativity, and was identified by another depositor. The place of business given by him was near the bank, but no investigation was made there. Held, that the bank failed to use proper care and diligence before paying the deposit, and was liable to the depositor for the amount of the deposit. *Rosen v. State Bank*, 32 Misc. Rep. 231, 65 N. Y. S. 666.

37. Payment upon presentation of book by one apparently in lawful possession.—*Sullivan v. Lewiston Inst.*, 56 Me. 507, 96 Am. Dec. 500.

So held where the regulations of the bank, to which the depositor had assented, contained a provision that the institution would not be responsible for payments made on presentation of the book when a depositor had not given notice that it had been stolen or lost. *Sullivan v. Lewiston Inst.*, 56 Me. 507, 96 Am. Dec. 500.

Payment by a savings bank to a person presenting a passbook is good, if the officers have no notice of fraud upon the depositor, and in making such payment exercise reasonable care and diligence. *Hayden v. Brooklyn Sav. Bank (N. Y.)*, 15 Abb. Prac., N. S., 297.

Depositor not prejudiced by failure of officers to make inquiries.—Where a savings bank paid a deposit to a person presenting the depositor's passbook and a check purporting to bear the signature of the depositor, the depositor was not prejudiced by a failure of the bank officials to make inquiries of the person presenting the passbook and check as to the reason why the depositor did not appear in person, on it appearing that the person presenting the passbook and check would have informed the bank officials that the depositor was living in her family and supported at her house and was ill. *Campbell v. Schenectady Sav. Bank*, 114 App. Div. 337, 99 N. Y. S. 927.

ment of a deposit to a person not entitled to receive it, but who presents the pass book, will not discharge the bank from liability to the owner, if at the time of payment any fact or circumstance was brought to the knowledge of the bank officers reasonably calculated to excite suspicion and inquiry by an ordinarily careful person, and the officers failed to make inquiry or to exercise proper care; and the bank can not avoid liability by the adoption of arbitrary rules and causing them to be printed in its pass books.³⁸ Payment by a bank to an imposter in the form of a check on a commercial or national bank payable to the order of the real depositor does not exempt the bank from liability to the true owner of the deposit.³⁹ Under a by-law providing that money may be withdrawn by the depositor, or by any other person duly authorized to receive it, the officers of the bank must decide upon the genuineness of the authority presented at their peril.⁴⁰

§ 301 (4) Payment to One Wrongfully in Possession of Pass-book.—A saving bank is not liable for money paid from a deposit to one wrongfully in possession of the passbook, if it has exercised reasonable care to protect the depositor.⁴¹ But if it has failed to exercise such reasonable

38. Effect of circumstances reasonably calculated to excite suspicion and inquiry.—*Gerardi v. New York Sav. Bank*, 58 Misc. Rep. 183, 109 N. Y. S. 22.

Where the tellers of a savings bank, upon presentment of forged checks, noticed a dissimilarity of the signature on the checks and the depositor's signature on the bank's signature book, and called it to the attention of the bank treasurer, who ordered the checks paid without taking any steps to ascertain the genuineness of the signatures, the bank was negligent, and is liable to the depositor for the loss occasioned by the forgeries. *Gerardi v. New York Sav. Bank*, 58 Misc. Rep. 183, 109 N. Y. S. 22.

The by-laws of a savings bank provided that, in order to draw out money, the passbook must be presented at the bank, and that absent depositors could withdraw their deposits on their order or checks, properly witnessed. Held, that the bank was liable to a depositor for money paid on forged checks, to one who had possession of the passbook of the depositor, which were not witnessed as required by the by-laws. *People's Sav. Bank v. Cupps*, 91 Pa. 315.

Bank not liable though officer notices slight irregularities in signature on draft.—Where the passbook of a depositor in a savings bank was presented to the bank with a forged draft against the deposit, and the evidence shows that the officer of the bank

making payment, upon noticing a few slight irregularities in the signature, had his suspicion aroused, and asked all the test questions for identification, and that the person applying for payment, with the passbook in his possession, and claiming to be the depositor, correctly answered each, the bank had the right to rely on the appearances thus presented and to make the payment called for. *Ferguson v. Harlem Sav. Bank*, 43 Misc. Rep. 10, 86 N. Y. S. 825.

39. Payment to imposter by check payable to order of depositor.—*Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

40. By-law authorizing withdrawal by depositor or other person authorized to receive payment.—*Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288. See post, "Payment to One Wrongfully in Possession of Passbook," § 301 (4).

41. Bank not liable if it has exercised reasonable care.—*Ferguson v. Harlem Sav. Bank*, 92 N. Y. S. 261; *Kenney v. Harlem Sav. Bank*, 61 Misc. Rep. 144, 114 N. Y. S. 749.

Bank held to have exercised reasonable care to protect depositor.—Plaintiff, making a deposit in a savings bank, was at the time unable to write, but made his mark. Thereafter, having learned to write, he signed his name in the signature book, and brought action thereafter to recover moneys paid out on alleged forged drafts. It was conceded that plaintiff

care it is liable to the depositor for the amount so paid.⁴² The fact that the person presenting a passbook demands the entire amount on deposit, where

personally never drew any money, but he roomed with one who, from his intimate acquaintance with him, was able to answer all the identification questions asked by the bank's teller on presentation of the drafts. The teller testified that when a forged draft was paid the passbook was produced and a correct answer given to each of the questions, and there was nothing to arouse suspicion that the person presenting the passbook was not entitled to the same. Held, that the bank had fulfilled its obligation to exercise reasonable care to protect the depositor. *Kenney v. Harlem Sav. Bank*, 61 Misc. Rep. 144, 114 N. Y. S. 749.

Though the signature of a person presenting a passbook to a savings bank for payment of a deposit made twelve years before is different from the signature of the depositor, written in the signature book at the time he made the deposit, still, if on inquiry the person says that he is the depositor, and correctly answers three of the eight test questions written in the signature book, giving the county in a foreign country where the depositor was born, the name of the vessel on which he came to this country, and his mother's maiden name, even though the teller did not ask him the other five questions, it is not error for the court to hold, as a matter of law, that the bank used reasonable care in paying the deposit. *Wall v. Emigrant, etc., Sav. Bank*, 64 Hun 249, 19 N. Y. S. 194, 46 N. Y. St. Rep. 601.

On the issue whether a savings bank was liable for the withdrawal of a depositor's fund on a forged signature, it was shown that, when the payment was made, the person to whom it was made presented a draft, together with the depositor's passbook, and that the person answered the test questions correctly. An entry of withdrawal was made in the passbook. The depositor thereafter had possession of the book, and on six different occasions he personally made deposits, which were entered therein without an inquiry as to the meaning of the withdrawal entry. Held, that the bank, as a matter of law, was not liable; there being no evidence of want of reasonable care on its part. *Ferguson v. Harlem Sav. Bank*, 92 N. Y. S. 261.

A savings bank, on opening an account with a person who could not write, asked him certain questions, the

answers to which were entered in the signature book. Afterwards some one stole the passbook, and presented it to the bank. He was asked the questions which had been asked the depositor, and answered all of them satisfactorily, whereupon the bank paid the amount of the deposit to him. Held, that the bank exercised due care to ascertain the identity of the person presenting the passbook. 39 N. Y. S. 840, reversed. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. Rep. 574, 40 N. Y. S. 662, 75 N. Y. St. Rep. 64.

42. Bank liable if it fails to exercise reasonable care.—*Hough Ave. Sav., etc., Co. v. Anderson*, 9 O. C. C., N. S., 13, 19-29 O. C. D. 107.

Facts held to constitute negligence.

—A savings bank which has paid out all of a deposit on a forged order purporting to have been written by the depositor, accompanied by the passbook which had been lost by or stolen from the depositor, is liable to the depositor for the amount thus paid out, if the forged signature was written "Anderson," and the depositor's signature, written on a card at the time of opening his account, was "Andersson." It is negligence in the bank not to have detected and been warned by the discrepancy. *Hough Ave. Sav., etc., Co. v. Anderson*, 9 O. C. C., N. S., 13, 19-29 O. C. D. 107.

If a comparison by the officers of a savings bank of the signature of the person falsely presenting a deposit book with the genuine one on file would prevent a fraudulent imposition, then payment to an impostor without such comparison, and without requiring any proof of the identity of the person demanding payment, other than the possession of the bank book, is no defense to an action by the depositor against the bank to recover the deposit. *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

Sufficient evidence that ordinary care was not used.—In an action by a depositor against the bank for money paid out by it on a forged withdrawal slip presented with the passbook by one who had stolen it, the evidence showed that there was a marked difference between the signature to the withdrawal slip and that of the depositor in the bank's signature book, and there was no evidence that they were compared by the teller who

only small sums had been drawn out theretofore, is not a suspicious circumstance, which should put the bank on inquiry as to the identity of the person presenting the book.⁴³ Where payments are made by the officers of a bank on orders purporting to be signed by a depositor, but in fact forgeries, accompanied by the deposit book, of the loss of which the bank has not been notified, no question of negligence of the bank is involved in a suit by the depositor to recover his money.⁴⁴

Payment to One Appointed Administrator under Erroneous Belief That Depositor Is Dead.—A depositor in a savings bank may maintain an action to recover the amount of his deposit, although, upon production of the deposit book, the bank has paid the amount due to one who has been appointed as his administrator under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from.⁴⁵

Agreement Rendering Bank Liable Notwithstanding Good Faith and Ordinary Care.—A bank may by agreement make itself liable for a payment to one wrongfully in possession of the deposit book, though the payment was made in good faith and in the exercise of ordinary care, and in accordance with the general practice among savings banks.⁴⁶

made the payment. Held, that there was sufficient evidence that ordinary care was not used. *Tobin v. Manhattan Sav. Inst.*, 6 Misc. Rep. 110, 26 N. Y. S. 14, 57 N. Y. St. Rep. 856, affirming judgment in 3 Misc. Rep. 628, 23 N. Y. S. 1165; S. C., 7 Misc. Rep. 744, 27 N. Y. S. 1124.

Facts showing negligence on part of cashier and assistant cashier.—The cashier of a savings bank paid a part of a deposit, on a forged check or receipt, to a stranger who had stolen the passbook from the depositor, without availing himself of the means at hand to identify the person demanding payment. Held, in an action by the depositor against the bank, that a finding that the cashier was negligent would not be disturbed. *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786, affirming 53 Hun 632, 6 N. Y. S. 101, 25 N. Y. St. Rep. 161, 2 Silvernail 531. See, also, *Hager v. Buffalo Sav. Bank*, 10 Misc. Rep. 455, 31 N. Y. S. 448, 64 N. Y. St. Rep. 25.

Another payment on the deposit was made to the same person by the assistant cashier. The latter testified that he doubted the genuineness of the signature to the receipt, and that he asked the person presenting it if he could not write a more fluent hand, and received as an answer that he was not feeling well. The assistant cashier also testified that he thought

he had put other questions to the person demanding payment, and that he received correct answers. Held that, in view of the fact that the assistant cashier was an interested witness, and that plaintiff's signature, as well as the forged receipt, were in evidence, a finding by the jury that the assistant cashier was also negligent would not be disturbed. *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786, affirming 53 Hun 632, 6 N. Y. S. 101, 25 N. Y. St. Rep. 161, 2 Silvernail 531.

43. Fact not putting bank on inquiry as to identity of person presenting book.—*Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. Rep. 574, 40 N. Y. S. 662, 75 N. Y. St. Rep. 64.

44. Payments made under circumstances not involving question of negligence.—*Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016.

45. Payment to one appointed administrator under erroneous belief that depositor is dead.—*Jochumsen v. Suffolk Sav. Bank (Mass.)*, 3 Allen 87.

46. Agreement rendering bank liable notwithstanding good faith and ordinary care.—Such is the effect of an agreement that deposits and dividends withdrawn shall be paid only to the depositor, or his order or legal representatives, and then only on the depositor's book being presented, in the absence of any modifying agreement, where the bank makes a payment on

By-Laws and Rules Intended to Protect Bank from Liability.—The by-laws or rules of savings banks usually contain a provision intended to protect the bank from liability for payments made to one who has wrongfully obtained possession of, and who presents at the bank, a passbook belonging to a depositor, and it is customary to print such rules in the passbook. While these by-laws and rules are somewhat variant in phraseology, there is in substance and legal effect much similarity between them. One of these by-laws or rules that is commonly printed in the passbook provides that all payments to persons producing the passbook shall be valid payments to discharge the bank. It has been held that such a by-law or rule, or one of similar import, will not prevent a recovery by a depositor whose passbook has been stolen, or obtained from him by fraud, and the deposit in whole or in part withdrawn, unless the bank used ordinary care in making the payment.⁴⁷ But where the bank is not chargeable with want of diligence or any omission of duty in making the payment, such payment is valid and binding upon the depositor,⁴⁸ and in such case it is immaterial that the passbook

a forged order of one who had fraudulently obtained possession of the deposit book. *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

But in Georgia it has been held that a rule of a savings bank that depositors must always present their passbooks when depositing or withdrawing money, and that "if not present personally" an order signed and witnessed must accompany the presentation of the book, does not affect the principle that where a bank pays in good faith a forged check to a person presenting the bank book, and whom it believes to be the depositor, it is not liable to the depositor therefor. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

47. By-laws and rules protecting bank from liability for payments to persons producing passbook.—*Ackenhansen v. People's Sav. Bank*, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338; *Kelly v. Emigrant, etc., Sav. Bank (N. Y.)*, 2 Daly 227; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Cornell v. Emigrant Industrial Sav. Bank*, 44 Hun 630, 9 N. Y. St. Rep. 72; *Saling v. German Sav. Bank*, 7 N. Y. S. 642, 15 Daly 386, 27 N. Y. St. Rep. 975; *Clark v. Saugerties Sav. Bank*, 62 Hun 346, 17 N. Y. S. 215, 42 N. Y. St. Rep. 285; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786; *Wall v. Emigrant, etc., Sav. Bank*, 64 Hun 249, 19 N. Y. S. 194, 46 N. Y. St. Rep. 601; *Kress v. East Side Sav. Bank*, 66 Hun

635, 21 N. Y. S. 652, 50 N. Y. St. Rep. 273; *Tobin v. Manhattan Sav. Inst.*, 6 Misc. Rep. 110, 26 N. Y. S. 14, 57 N. Y. St. Rep. 856, affirming 3 Misc. Rep. 628, 23 N. Y. S. 1165; *Abramowitz v. Citizens' Sav. Bank*, 17 Misc. Rep. 297, 40 N. Y. S. 385; *Israel v. Bowery Sav. Bank (N. Y.)*, 9 Daly 507.

A stipulation between a savings bank and a depositor that his deposit may be paid to any one presenting his book, does not relieve the bank from the duty of exercising reasonable care in the payment of the money. *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171.

A provision in the by-laws of a savings bank, signed by depositors, that the "bank will not be responsible for frauds committed on the officers by producing the passbook and drawing money without the knowledge or consent of the owner," does not discharge the bank from the obligation to exercise ordinary care as to the identity of persons presenting passbooks. *Saling v. German Sav. Bank*, 7 N. Y. S. 642, 15 Daly 386, 27 N. Y. St. Rep. 975; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

48. Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418, reversing 33 N. Y. Super. Ct. 440.

Instruction held erroneous.—Where, in an action by a depositor against a savings bank to recover the amount paid out on a stolen passbook, it appears that the bank's rules provide that presentation of the book shall be sufficient authority to pay the deposit to the bearer, it is error to charge that possession by a stranger of the book

when presented was accompanied by a forged order, purporting to have been signed by the depositor.⁴⁹ The requisite degree of care is not shown where the payment is made to a person producing a deposit book under such circumstances as to raise a reasonable suspicion as to his ownership thereof,⁵⁰ or where any fact or circumstance existed calculated to put the bank on inquiry.⁵¹ It has been held that a bank can not avail itself of the protection of such a by-law or rule unless it shows that it was brought to the knowledge of the depositor at the time when he made the deposit;⁵² and

constitutes no right to draw the money thereon. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. Rep. 574, 40 N. Y. S. 662, 75 N. Y. St. Rep. 64.

49. Immaterial that passbook was accompanied by a forged order.—*Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, reversing 33 N. Y. Super. Ct. 440.

Where a bank deposit book stated that all payments made to persons producing the book should be deemed valid as to depositors, who alone were responsible for the safe-keeping of their books; that no withdrawal would be allowed without the book, and the book was the order of withdrawal; and plaintiff testified that a few days after she received the book she allowed her husband to take possession of it, and, on his afterwards telling her that he lost it, she gave no notice to the bank; and orders signed, or purporting to be signed, by her were produced, together with the book, at the time disputed payments were made—there was nothing in the circumstances to put the bank on notice requiring it to exercise more diligence regarding such payments than in cases where only the book was produced. *Winter v. Williamsburgh Sav. Bank*, 68 App. Div. 193, 74 N. Y. S. 140.

50. When ordinary care is not shown.—*Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

51. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. Rep. 574, 40 N. Y. S. 662, 75 N. Y. St. Rep. 64.

Where a person gives to another a power of attorney to draw money from a savings bank, and describes himself in the body of the instrument as executor of the estate owning the deposit, and gives the number of the bank book, and signs the document merely as an individual, it confers no authority on the bank to pay the money to the attorney, and such payment on presentation of the passbook does not show the ordinary care that will relieve the bank from liability, when the passbook and power of attorney were

obtained by fraud, although the by-laws of the bank authorized it to pay to the person presenting the passbook. *Gearns v. Bowery Sav. Bank*, 135 N. Y. 557, 32 N. E. 249.

52. Necessity of by-law or rule being brought to knowledge of depositor.—In an action by a depositor against a savings bank, it appeared that the bank had paid money on an order to a person who brought with him the depositor's bank book. The order was forged, and the bank book had been stolen. The savings bank had a standing rule, on account of the difficulty of identifying its depositors, that any person bringing the bank book of a depositor should, in the absence of suspicious circumstances, be taken to be the depositor, or to have an order from him. Held that, in the absence of anything to show that the rule had been brought distinctly to the knowledge of the depositor at the time when he made the deposit, the bank could not avail itself of the payment on a forged order as a defense to plaintiff's suit. *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59.

A passbook of a savings bank had printed therein its rules and regulations from the charter and by-laws, one of which was that the secretary will use his best efforts to prevent frauds, "but all payments to persons producing deposit books shall be deemed good and valid payments to depositors, respectively." Held, that where the bank, on delivering the deposit book to a depositor, did not call her attention to its contents, and afterwards paid money to another who produced such deposit book and a forged order for the money, it was liable to the depositor for the money so paid. *Schoenwald v. Metropolitan Sav. Bank*, 33 N. Y. Super. Ct. 440.

A by-law of a savings bank, which is organized under the general banking laws, and which is required by statute to have capital stock and stockholders, providing that the bank shall not be liable to a depositor for pay-

where there is a statute providing that the regulations of the bank shall be put in some conspicuous place where the business shall be transacted, and shall be printed in the passbooks, the bank will not be exempted by such a by-law from liability for money paid to a person presenting a stolen passbook, unless it shows affirmatively that it has complied with the statute.⁵³ The by-laws or rules not infrequently contain, in addition to the provision that payments to persons producing the passbook shall be valid payments to discharge the bank, the additional provision that the bank will endeavor to protect depositors, or that it will endeavor to prevent fraud and imposition. Under such provisions the bank is required to exercise ordinary care and diligence to identify persons presenting passbooks, or to ascertain whether they are authorized to receive payment.⁵⁴ The by-laws or rules

ments of the moneys deposited to the holder of his passbook, though it should be stolen from the depositor, is not binding on the depositor, unless he has notice thereof, where there is a statute providing that deposits shall be paid to the depositor or his personal representatives. *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175, 68 N. W. 118, 33 L. R. A. 408, 64 Am. St. Rep. 338, construing Pub. Laws 1887, p. 233.

53. A New York Statute, Laws 1875, c. 371, § 23, provides that deposits in savings banks "shall be repaid after demand, under such regulations as the board of trustees shall prescribe, which regulations shall be put in some conspicuous place where the business shall be transacted, and shall be printed in the passbooks." Held, that by-laws reciting that "on making the first deposit each depositor shall be required to subscribe his name in the signature book, thereby signifying assent to the by-laws," and that "all payments made to persons producing the deposit book issued by the bank shall be deemed valid payments to the depositors respectively," did not exempt the bank from liability for money paid to a person presenting a stolen passbook, unless it was shown affirmatively that the bank had complied with the statute. *Kress v. East Side Sav. Bank*, 66 Hun 635, 21 N. Y. S. 652, 50 N. Y. St. Rep. 273.

54. Provision in addition to that protecting bank that bank will endeavor to protect depositors.—*Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786, affirming 53 Hun 632, 6 N. Y. S. 101, 25 N. Y. St. Rep. 161, 2 Silvernail 531; *Clark v. Saugerties Sav. Bank*, 62 Hun 346, 17 N. Y. S. 215, 42 N. Y. St. Rep. 285; *Wall v. Emigrant, etc., Sav. Bank*, 64

Hun 249, 19 N. Y. S. 194, 46 N. Y. St. Rep. 601; *Tobin v. Manhattan Sav. Inst.*, 6 Misc. Rep. 110, 26 N. Y. S. 14, 57 N. Y. St. Rep. 856, affirming judgment 3 Misc. Rep. 628, 23 N. Y. S. 1165; S. C., 7 Misc. Rep. 744, 27 N. Y. S. 1124; *Kenney v. Harlem Sav. Bank*, 61 Misc. Rep. 144, 114 N. Y. S. 749; *Ficken v. Emigrants', etc., Sav. Bank*, 33 Misc. Rep. 92, 67 N. Y. S. 143; *Ferguson v. Harlem Sav. Bank*, 43 Misc. Rep. 10, 86 N. Y. S. 825; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

The by-laws of a savings bank provided that the passbook should be the voucher of the depositor, and that its possession should be sufficient authority to the bank to warrant any payment made, and entered in it, and that, although the bank would endeavor to prevent fraud on its depositors, yet all payments made to persons producing the passbook should be valid payments to discharge the bank. Held that, notwithstanding the protective character of the by-laws as to payments, the bank was not relieved from the exercise of that investigation necessary to carry out the undertaking expressed by the words that it "would endeavor to prevent fraud on its depositors," and, failing to use such care as thereby prevented an unauthorized payment made to one other than the owner, who presented the passbook, would not discharge it. *Cornell v. Emigrant Industrial Sav. Bank*, 44 Hun 630, 9 N. Y. St. Rep. 72.

Bank held not to have used ordinary care.—Where one deposited money in a savings bank for an infant, and the deposit was paid to the child's father on presentation of the passbook by him, a by-law of the bank, printed in the passbook, to the effect that, while the bank would endeavor to protect depositors, all payments to persons

sometimes provide that the depositor must notify the bank if his passbook is lost or stolen, or that the bank will not be responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, and this notice is sometimes required to be in writing. Such a requirement is reasonable and binding upon depositors;⁵⁵ and this is so even in the case of a depositor who is illiterate and can not read the rules of the bank.⁵⁶ But

producing passbooks should discharge the bank, did not relieve the bank of liability to the beneficiary, since, knowing the one presenting the book to be her father, it did not use ordinary care. *Ficken v. Emigrants', etc.*, Sav. Bank, 33 Misc. Rep. 92, 67 N. Y. S. 143.

Bank held to have exercised sufficient diligence before paying a check, afterwards ascertained to have been forged, presented with the passbook, to preclude recovery by the depositor of the amount so paid. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

Dissimilarity of signatures as evidence of negligence.—The rules of a savings bank, provided in substance, that, although the bank would endeavor to prevent fraud upon its depositors, yet that the possession of the passbook issued by it would be sufficient authority to warrant any payment, and that all payments to persons producing such book would be valid. It was the custom of the bank to require a signature of each depositor, at the opening of an account, in a book kept for that purpose. The book of a depositor, who had so signed, was stolen, and was presented to the bank by a person who signed such depositor's name to a receipt for the amount of the deposits, and received the same. In an action by the depositor against the bank to recover the amount, defendant's assistant teller, who paid the money, testified that he compared the signature to the receipt with that of plaintiff's upon the book, and was satisfied that the former was genuine. Plaintiff's evidence tended to show that the signatures were unlike. Held, that while the bank was not absolutely discharged by a payment upon production of the passbook, irrespective of the exercise of ordinary care in the examination of the signature, yet, to be evidence of negligence, the dissimilarity must be so marked and apparent that it would be readily discovered by a person competent to hold the position of teller; and that it did not appear affirmatively

that the dissimilarity was of such a character. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

55. By-laws or rules requiring notice that passbook is lost or stolen—Binding upon depositors.—A rule providing that "every effort will be made to protect depositors against fraud, but payment made to a person presenting a passbook shall be good and valid on account of the owner, unless the passbook has been lost and notice in writing given to (the) bank before such payment is made," is reasonable and binding upon depositors, and under its terms where a passbook is presented by a person other than the depositor to whom it belongs, together with a forged check bearing a signature similar to that of the depositor, and there is nothing to arouse the suspicion of the teller or put him upon inquiry, as a reasonably prudent man, as to the genuineness of the check, and the bank in good faith pays the check, believing the person presenting it to be the depositor, it is not liable in a suit by the depositor to recover the money so paid. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

56. Requirement binding notwithstanding illiteracy of depositor.—Among the rules of a savings bank was the following: "If any person shall present a deposit book at the office of this corporation, and allege himself or herself, untruly, to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor, neither will this institution be liable to make good the same: Provided, that such payment has been entered in the book of the depositor at the time when made." The book of a depositor was temporarily abstracted from his trunk and certain moneys drawn from the bank without

such a by-law or rule does not relieve the bank from the duty of acting in good faith, and with reasonable care, in making payment on presentation of a passbook.⁵⁷ The binding effect of such a rule is not affected by another

the knowledge of the depositor. He afterwards brought suit for the amount, and it was alleged that the above rule relieved the bank from liability. Held, that the rule of the bank was reasonable and necessary for its safety, and that plaintiff could not recover. Held, further, that the fact that plaintiff was illiterate and could not read the rules in the bank book delivered to him. Made no difference. *Burrill v. Dollar Sav. Bank*, 92 Pa. 134.

57. *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700.

In Massachusetts it has been held that where the by-laws of a savings bank, contained in the deposit book of a depositor, provide that "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part, on presentation," the bank will not be liable for paying the deposit in whole or in part to one who falsely personates the depositor in presenting a stolen book, provided the payment is made in good faith without negligence and without notice that the book had been stolen. *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320; *Kimins v. Boston, etc., Sav. Bank*, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441; *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650; *Donlan v. Provident Inst.*, 127 Mass. 183, 34 Am. Rep. 358. See, also, *Jochumsen v. Suffolk Sav. Bank*, (Mass.), 3 Allen 87.

But such a by-law was held not to protect the bank from liability for making a payment to one who falsely claimed to act under authority from the depositor; it being so held where the payment was made to one presenting the passbook and forged orders purporting to be signed by the depositor. *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650. See, also, *Kimins v. Boston, etc., Sav. Bank*, 141 Mass. 33, 6 N. E. 242, 55 Am. Rep. 441.

It was also held that such a by-law would not prevent a depositor from maintaining an action against the bank

to recover the amount of his deposit, which, upon production and delivery to it of the deposit book, the bank had paid to one who had been appointed as administrator of the depositor under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from. *Jochumsen v. Suffolk Sav. Bank* (Mass.), 3 Allen 87.

Where a by-law similar to the one quoted above contained the following additional clause: "In all cases a payment upon presentation of a deposit book shall be a discharge to the corporation for the amounts so paid," it was held that this additional clause enlarged the by-law, so as to protect the bank if it, using reasonable care, in good faith paid the whole of the plaintiff's deposit upon the presentation of his book, although the book had been stolen, and an order purporting to be signed by the depositor forged. *Levy v. Franklin Sav. Bank*, 117 Mass. 448. See, also, *McCarthy v. Provident Inst.*, 159 Mass. 527, 34 N. E. 1073, and *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650.

Negligence rendering bank liable notwithstanding depositor's failure to give notice.—A savings bank which has paid out all of a deposit on a forged order purporting to have been written by the depositor, accompanied by the passbook which had been lost by or stolen from the depositor, is liable to the depositor for the amount thus paid out if the forged signature was written "Anderson," and the depositor's signature, written on a card at the time of the opening his account, was "Andersson." It is negligence in the bank not to have detected and been warned by the discrepancy, and the rule to which the depositor has subscribed, that he must notify the bank if his passbook be lost or stolen, will not defeat his recovery though he has failed to observe it. *Hough Ave. Sav., etc., Co. v. Anderson*, 9 O. C. C., N. S., 13, 19-29 O. C. D. 107.

Reasonable care held to have been used.—The brother of a depositor in defendant bank, neither of whom was known to the bank officers, presented the deposit book for payment, representing himself as the owner, and, when asked how the deposit had been made,

rule of the bank, requiring the depositors to present their passbooks when depositing or withdrawing money, and providing that "if not present personally, an order properly signed and witnessed must accompany the presentation of the book, in case of withdrawal."⁵⁸ Where the by-laws of a savings bank, printed in the passbooks of depositors, provide that deposits withdrawn shall be paid only to the depositor or to his order, and then only on the depositor's books being presented, but that it will not be responsible to any depositor for any fraud practiced on it, by forged signatures, or by presenting a depositor's book and drawing money without the knowledge or consent of the owner, the bank is not relieved of its duty of exercising ordinary care in preventing payment of a deposit to a wrong person, though he present a depositor's book,⁵⁹ but it is not liable to a depositor for payments made in the exercise of ordinary care to a person wrongfully in possession of the passbook.⁶⁰

§ 301 (5) Payment on Death of Depositor.—A savings bank must

he correctly replied that it was by letter from a third person. In signing the name, he formed an initial so obscurely that it caused comment from the president. Notice of the loss of the book, required by the by-laws to be given defendant as a guard against a wrong payment, and as a prerequisite to defendant's liability therefor, was not given. Held, that defendant used reasonable care in making payment, and was not liable. *Gifford v. Rutland Sav. Bank*, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794, 25 Am. St. Rep. 744.

The negligence of a depositor in a savings bank in losing his book does not excuse the officers of the bank from the exercise of reasonable care to prevent payment to an impostor, notwithstanding a by-law requiring immediate notice to the bank by the depositor of the loss of his book. *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288.

58. Provision not affecting binding effect of rule.—*Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94.

59. By-laws protecting bank and depositors harmonized and construed.—*Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

Where the by-laws of a savings bank, assented to by depositors, provide that no payment shall be made unless the depositor shall call in person, or by an attorney duly constituted in writing, the bank is liable to a depositor for its negligent payment of the deposit, on a forged check or receipt, to

a stranger who had stolen the depositor's passbook, though another by-law exempts the bank from liability for fraud committed on its officers in producing the pass book and drawing the money without the knowledge or consent of the owner, as the latter by-law does not relieve the bank from active vigilance in order to detect fraud and forgery. *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 28 N. E. 398, 11 L. R. A. 786, affirming 53 Hun 632, 6 N. Y. S. 101, 25 N. Y. St. Rep. 161, 2 Silvernail 531 criticising *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418, affirming 53 Hun 632, 6 N. Y. S. 101.

60. *Chase v. Waterbury Sav. Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

A savings bank adopted, and caused to be printed upon its deposit books, a by-law which provided that "deposits and dividends shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized, and only upon production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers." Held, that a payment made by the bank, in good faith and in the exercise of due care, to any person who produces the pass-book, operates to discharge the bank, without regard to whether or not such person is entitled to draw the money. Judgment 64 N. J. L. 39, 44 Atl. 936, reversed. *Cosgrove v. Provident Inst.*, 64 N. J. L. 653, 46 Atl. 617.

exercise diligence to ascertain whether one who presents a decedent's passbook is entitled to receive payment, and if in such case it negligently makes payment to a person not entitled to receive it it will be liable for the amount so paid.⁶¹

Joint Tenancies in Deposits.—Where a savings bank deposit is in joint names, and the intent appears to create a joint tenancy, the survivor takes title to the entire fund, irrespective of whether he ever had any possession of the passbook.⁶² Joint tenancies of savings bank deposits may be

61. Liability for negligently paying to wrong person.—*Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218, 62 N. Y. S. 961; *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720.

A savings bank must exercise ordinary care in paying money out of a depositor's account after his death, upon the production of his bank book, and the presentation of a draft purporting to bear his signature, when the bank has had no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact. *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720.

Where in such a case a bank fails to make a physical comparison of the purported signature to the draft with the signature of the depositor on file in the bank, and in point of fact the signature is a forgery, the bank is liable as it has failed to exercise due care and ordinary caution. *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720.

By-law not relieving bank from exercising diligence.—Where a bank by-law provided that the bank would endeavor to prevent frauds, but that payment to any one presenting a passbook would discharge the bank, and another by-law provided that, on the death of a depositor, his deposit should be paid to his personal representative, the first applied only to payments made in the lifetime of the depositor, and did not relieve the bank from exercising diligence to ascertain whether one who presented decedent's passbook was entitled to receive payment. *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218, 62 N. Y. S. 961.

62. Joint tenancies.—*Judgment*, 92 App. Div. 529, 87 N. Y. S. 54, affirmed. *Farrelly v. Emigrant, etc.*, Sav. Bank, 179 N. Y. 594, 72 N. E. 1141; compare *Schippers v. Kempkes* (N. J.), 67 Atl. 1042, affirmed in 72 N. J. Eq. 948, 73 Atl. 1118.

Facts held to show a joint tenancy.—Where two persons are accepted as depositors by a savings bank, and both sign the depositor's book, and the moneys are made payable to either, the contract is with both jointly, and has the incident of survivorship. *Dunn v. Houghton* (N. J.), 51 Atl. 71.

Where a mother, who had a deposit in a savings bank to her credit, caused the account to be so changed as to read, "In account with S. or son F.," and shortly before her death she delivered the book to a third person, telling her to keep it for the son, the facts sufficiently showed that the mother intended to make the son a joint owner in the account. *Judgment*, 92 App. Div. 529, 87 N. Y. S. 54, affirmed. *Farrelly v. Emigrant, etc.*, Sav. Bank, 179 N. Y. 594, 72 N. E. 1141.

The New York Banking Law (Consol. Laws 1909, c. 2), § 143, provides that the bank book issued by savings banks shall be evidence between the banks and the depositors holding the same of the terms on which the deposits are made. M. and S. opened an account with a savings bank, "payable to either and to the survivor," and signed the usual bank signature book, agreeing to be bound by the rules of the bank, one of which provided that the bank book was a voucher between the bank and the depositor, subject to equities arising between the parties. Both were at the bank at the same time to open the account. The bank book remained in the possession of M., and he drew on the account from time to time, while S., who owned the money deposited, drew nothing on the account. Held, that M. and S. were joint owners of the deposit, and M., surviving S., was entitled to the balance remaining. *Bonnette v. Molloy*, 153 App. Div. 73, 138 N. Y. S. 67.

Facts held not to show a joint tenancy.—A and B deposited money in a savings bank, the credit being given to "A or B" at their request. They afterwards deposited frequently in the same way, stating to the bank officers

created, if so the parties intend, irrespective of whether the tenants be husband and wife, and in such case the right of survivorship exists.⁶³

Money Deposited in Depositor's Name in Trust for Another.—

Where one deposits money in a savings bank in his own name in trust for another the presumption is that a valid trust is created, and upon the death of the depositor the cestui que trust is entitled to the amount so deposited;⁶⁴

that either or both could draw the money. B died. A notified the bank that B's widow and administratrix had the book, and directed the bank not to pay her. The bank did pay her the deposit, however, on her producing the book and her letters. Held, a joint tenancy was not created, but that A could maintain an action for her actual share of the deposits. *Mulcahey v. Emigrant, etc.*, Sav. Bank, 89 N. Y. 435, reversing 62 How. Prac. 463.

Where a deposit in a savings bank was made by D. out of his own funds, but in the name of "D. or G.," a joint tenancy was not created, and the savings bank was protected, on payment of the funds to D.'s executrix on presentation by her of the passbook and testamentary letters, where G. had never made any claim to the deposit up to that time, and had never deposited or withdrawn any money, and had never had the passbook; and D.'s intention in making the deposit in the form recited was immaterial. Judgment, 74 N. Y. S. 741, 69 App. Div. 566, 37 Misc. Rep. 20, affirmed, *Grafiug v. Irving Sav. Inst.*, 69 App. Div. 566, 75 N. Y. S. 48.

63. Joint tenancy may be created by husband and wife.—Judgment 123 App. Div. 846, 108 N. Y. S. 493, affirmed. *West v. McCullough*, 194 N. Y. 518, 87 N. E. 1130.

Order to merge accounts of husband and wife.—A husband and wife, having separate accounts in a savings bank, addressed the bank in writing, requesting that their accounts be merged so as to run to either or the survivor of them. Held to constitute an order for the change of the accounts so as to make each a joint owner of the entirety, so that on the death of one the survivor would become the owner of the whole, but which was revocable by either party at any time before the order had been presented to the bank and complied with. Judgment, 90 App. Div. 613, 86 N. Y. S. 1128, reversed. *Augsbury v. Shurtliff*, 180 N. Y. 138, 72 N. E. 927.

In such case, if the order, after execution, is left with the husband, he is the agent of the wife, and if he fails

to deliver the order to the bank before the death of the wife, it is thereby revoked. *Augsbury v. Shurtliff*, 180 N. Y. 138, 72 N. E. 927, reversing 90 App. Div. 613, 86 N. Y. S. 1128.

Facts not creating a joint tenancy in husband and wife.—A husband deposited money belonging to himself in a savings bank, saying that he wanted it so that either he or his wife could draw the money, and both he and his wife entered their names on the signature book opposite which the clerk of the bank wrote the words "to be drawn by either." A passbook was given to the husband as a voucher for the deposit. The wife, after the death of her husband, presented the passbook at the bank, and drew out the money, giving a receipt therefor, signed by her in behalf of her husband. Held, she was bound to refund the money in an action brought by her husband's administrator. *Brown v. Brown* (N. Y.), 23 Barb. 565.

64. Effect of deposit in depositor's name in trust for another.—*Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Harrison v. Totten*, 53 App. Div. 178, 65 N. Y. S. 725; *Williams v. Brooklyn Sav. Bank*, 51 App. Div. 332, 64 N. Y. S. 1021; *Scott v. Harbeck*, 49 Hun 292, 1 N. Y. S. 788; *Robertson v. McCarthy*, 54 App. Div. 103, 66 N. Y. S. 327; *In re Finn*, 44 Misc. Rep. 622, 9 N. Y. S. 159; *Weaver v. Emigrant, etc.*, Sav. Bank (N. Y.), 17 Abb. N. C. 82.

Where money is deposited in a savings bank by one person for the use of another, on the death of the depositor and the beneficiary the executor of the latter has the right to collect the money. *Fowler v. Bowery Sav. Bank*, 47 Hun 399, 14 N. Y. St. Rep. 515.

Mary F., whose name prior to her marriage was Mary M., was appointed administratrix to her husband's estate. There were certain savings bank accounts standing in the name of "James F., in trust for Mary F., his wife," "James F., in trust for Mary F.," and "James F., for Mary F." The money in the latter account had been transferred from an account standing in the name of James F., in trust for Mary

and this is so though the cestui que trust was not notified of such deposit, and the depositor kept the passbook,⁶⁵ if the depositor dies leaving the trust account open and unexplained.⁶⁶ But it would seem that a deposit so made is not such conclusive evidence of a trust as to preclude evidence of con-

M. Held, that in settling her accounts the administratrix was not chargeable with such money as that of the decedent. In re Finn, 44 Misc. Rep. 622, 9 N. Y. S. 159.

A woman deposited money in a savings bank in her name, as trustee for her husband, and drew the interest thereon during her life. She survived her husband, and at her death the passbook was found among her assets, but was presented to the bank, and the deposit drawn out, by the administrator of her husband, before any demand was made therefor by the administrator of the wife. Held, in the absence of proof rebutting the presumption of trust, that the bank was protected in its payment. *Bishop v. Seaman's Bank*, 33 App. Div. 181, 53 N. Y. S. 488.

65. *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Robertson v. McCarthy*, 54 App. Div. 103, 66 N. Y. S. 327; *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; reversing 74 Hun 53, 26 N. Y. S. 322, 56 N. Y. St. Rep. 171; *Weaver v. Emigrant, etc.*, Sav. Bank (N. Y.), 17 Abb. N. C. 82.

66. *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641, reversing 74 Hun 53, 26 N. Y. S. 322, 56 N. Y. St. Rep. 171.

Rule in Massachusetts.—A. B. deposited in a savings bank a sum of money belonging to her, in the name of "A. B., trustee for C. D.," and always retained the passbook. C. D. did not know of the deposit till after the death of A. B. A by-law of the bank provided that no one should receive his deposit without producing his passbook. A suit was brought against C. D. in which the bank was summoned as trustee, and the administrator of A. B.'s estate appeared as claimant. Held, that the administrator was entitled to the money as against the plaintiff, although evidence was offered of the intent of A. B. to create a trust in favor of C. D. *Clark v. Clark*, 108 Mass. 522.

Where one deposited his own money in his own name as trustee for another, but retained the bank book, and never gave to the alleged donee any

notice of the deposit; and there was evidence that it was made in that mode in order to evade a by-law of the corporation, which prohibited so large a deposit in the name of one person, it was held that the facts showed no intention on the part of the depositor to transfer to the plaintiff a present title to the property. *Brabrook v. Boston, etc., Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222.

In an action by the executor of A. against a savings bank to recover money deposited by A., it appeared that, after depositing in his own name and on his own account all that he was allowed to by the rules of the bank, A. made three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two grandchildren by name; that for these deposits he took separate bank books containing entries of the same, which after his death were found among his effects, having never been delivered to the persons named or to any one else for them; and that A. continued during his lifetime to collect, receipt for and use, as his own, all dividends declared upon these deposits. A by-law of the bank provided that "no person shall receive any part of the principal or interest, without producing the original books, in order that such payment may be entered thereon;" and another by-law provided that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." The son and grandchildren of A., who appeared as claimants of the money under the St. of 1876, c. 203, § 19, offered to prove, in addition to the facts above stated, that A. had said to each of them, at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money." Held, that upon all the evidence, a jury would be justified in finding that A. had fully constituted himself a trustee for the claimant. *Gerrish v. New Bedford Inst.*, 128 Mass. 159, 35 Am. Rep. 365.

temporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund;⁶⁷ and it has been held that a trust is not created where the depositor survives the beneficiary, and the evidence clearly shows that there was no intention to create a trust.⁶⁸ But the fact that the depositor dies, leaving a will which can operate on nothing if not on the fund deposited, will not negative the existence of a trust.⁶⁹ Where a trust is created it can not be defeated by the depositor afterwards withdrawing the money.⁷⁰

Deposit in Names of Different Persons.—Where, after one's death, savings bank books are found, showing deposits in the name of different persons, in the absence of evidence of the sources from which the moneys were derived, the claims of those intended must be determined by the names on the books.⁷¹

Authority to Appoint Person to Whom Deposit Shall Be Paid.—An act incorporating a savings fund society, and providing that a book shall be kept at the office, in which every depositor shall be at liberty to appoint some person to whom at death the money shall be paid, if not otherwise disposed of by will, is constitutional,⁷² and under it the appointee of a depositor, and not his administrator, is, upon the depositor's death, entitled to the deposit.⁷³

Where a by-law of a savings bank provides that the deposit of a deceased depositor shall be paid to her representative, and the bank has on file a power of attorney, executed by the depositor to a third person, to draw the deposit, the power is revoked by the death of the depositor, and

67. Deposit in depositor's name in trust for another not conclusive evidence of a trust.—*Mabie v. Bailey*, 95 N. Y. 206; *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641, reversing 74 Hun 53, 26 N. Y. S. 322, 56 N. Y. St. Rep. 171.

68. When a trust is not created.—A bank depositor changed a deposit standing in his own name to one in his name in trust for his brother, but did not inform his brother of the account, stated that he did not intend to give the money to his brother, and retained possession of the bank books until after his brother's death. Held, that no trust arose in favor of the brother. *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641.

A daughter deposited certain moneys in a savings bank in her name, as trustee for her mother, while the latter was living. The uncontradicted evidence showed that the moneys deposited were those of the daughter;

that she opened the accounts personally, and took the bank books. Held, to justify a conclusion that in making the deposit the daughter had no intent to give the money to her mother, in view of evidence of repeated declarations by the mother that she had no property. *In re Barefield* (N. Y.), 69 N. E. 732.

69. Fact not negating existence of trust.—*Weaver v. Emigrant, etc., Sav. Bank* (N. Y.), 17 Abb. N. C. 82.

70. Trust can not be defeated by depositor withdrawing money.—*Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Scott v. Harbeck*, 49 Hun 292, 1 N. Y. S. 788; *Robertson v. McCarthy*, 54 App. Div. 103, 66 N. Y. S. 327.

71. Deposits in names of different persons.—*In re Smith* (N. Y.), 17 Abb. N. C. 78; *Gaffney v. Public Administrator* (N. Y.), 4 Dem. Sur. 223.

72. Authority to appoint person to whom deposit shall be paid.—*Knorr's Appeal*, 89 Pa. 93.

73. Fidelity Ins. Co. v. Wright (Pa.), 16 Wkly. Notes Cas. 177.

the bank will be liable to his administrator if it pays the deposit to the holder of such power.⁷⁴

Certain by-laws and rules of savings banks intended to protect the bank from liability for payments of deposits, in whole or in part, to persons not entitled thereto, have been construed by the courts in relation to their effect on the bank's liability, where the payment is made after the death of the depositor.⁷⁵

Gifts of Deposits and Rights of Donees after Depositor's Death.—

The delivery by a depositor of his bank book together with an order for the payment of his deposit, constitutes a valid gift *inter vivos*; and this gift

74. By-law requiring deposit of deceased depositor be paid to his representative.—*Hoffman v. Union Dime Sav. Inst.*, 41 Misc. Rep. 517, 85 N. Y. S. 16, reversed on other grounds in 95 App. Div. 329, 88 N. Y. S. 686.

75. Construction of by-laws and rules intended to protect bank from liability for unauthorized payments.—Where a savings bank, after the death of a depositor, pays the deposit to a third person having a power of attorney, it is not protected in such payment by a by-law providing that the bank should be discharged on payment of the deposit to any one producing the deposit book, as such by-law is for the protection of the living alone. *Hoffman v. Union Dime Sav. Inst.*, 41 Misc. Rep. 517, 85 N. Y. S. 16, judgment reversed on other grounds in 95 App. Div. 329, 88 N. Y. S. 686.

Where a depositor in a savings bank sent the bank a writing requesting that another person be allowed to sign the signature book, and that the bank change the account so that the depositor or the other might draw the money, and the request was complied with, unless there had been a gift of the money to the other, payment of the deposit to him on presentation of the book by the bank, with knowledge of the depositor's death, was no protection to the bank as against his estate, notwithstanding its rule that payments made to persons producing a passbook should be deemed a valid payment. *O'Brien v. Elmira Sav. Bank*, 99 App. Div. 76, 91 N. Y. S. 564.

A deposited money in a savings bank, the passbook stating that the account was with her "in trust for B." A drew a year's interest, and died, and the bank paid the amount to her administrator upon his producing his letters and the passbook; the production of the book, by rule of

the bank, entitling the bearer to payment. The bank received no notice from B of his rights in the deposit. Held, that B's administrator could not maintain an action against the bank. *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 9 Abb. N. C. 146, 38 Am. Rep. 498, reversing 21 Hun 235.

A deposited money in a savings bank, whose by-laws, contained in his deposit book, provided that the bank will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment; that the bank does not undertake to be answerable for the consequences of mistakes as to identity, if it pays to a wrong party upon the bank book being presented; and that every depositor shall sign the by-laws, and agree to conform to them, and, in case of the loss or theft of the bank book, shall give immediate notice thereof to the bank. After the death of A, of which the bank had no actual notice, it paid the amount deposited, without negligence, and without notice that the book had been stolen, to B, who, fraudulently personating A, presented the book. After A's death, and before payment by the bank, his executor published the usual probate citation, addressed to the heirs at law, next of kin, and all persons interested in his estate, to appear and show cause, if any, against the probate of his will. Held, that the executor of A could not maintain an action against the bank for the amount so paid. *Donlan v. Provident Inst.*, 127 Mass. 183, 34 Am. Rep. 358.

As to the construction of by-laws and rules intended to protect the bank from liability for unauthorized payments, in relation to their effect on the bank's liability for payments made during the life of the depositor, see ante, "Payment to One Wrongfully in Possession of Passbook," § 301 (4).

being notified to the bank is a complete assignment of his right to the fund deposited. Therefore, upon the subsequent death of the depositor, the assignee and not the administrator of the depositor is the person to whom the deposit should be paid.⁷⁶ And even though the donee does not present the bank book and order to the bank until after the depositor's death, his title is good as against the next of kin of the depositor.⁷⁷ Possession of a depositor's passbook under a parol gift, made a day previous to the depositor's death, entitles the donee to draw the deposit as the "legal representative" of the donor, under a by-law of the bank which provides that on the death of a depositor, payment shall be made to his "legal representative."⁷⁸ Where one has an active savings bank account which, because of her incapacity resulting from age, she changes to the name of herself and son, the son thereby acquires the right to draw money from the account with the right of survivorship, but he acquires no title by gift which he can enforce after the death of the depositor.⁷⁹ Where there is a gift causa mortis of money on deposit in a bank and a delivery to the donee of the bank book, and the bank pays the money to the donor's administrator after receiving notice of the donee's claim, the donee is not compelled to look to the administrator, but may recover from the bank.⁸⁰ But where the rules of a bank provide that on the death of a depositor the fund shall be paid only to his personal representative, payment to one presenting the book and claiming the deposit by gift causa mortis is unwarranted;⁸¹ and this is so notwithstanding another rule of the bank providing that possession of the passbook is authority to the bank to pay, as such rule ceases to be effective upon the death of the depositor.⁸²

Payment to Administrator Appointed in Another State.—Where a savings bank pays a deposit standing in the name of a decedent, in good faith, to his administrator appointed in the state of his domicile, such payment is good as against an administrator appointed in the state where the bank is located, if the latter administrator has been guilty of laches, and the bank has had no notice of his appointment, though the appointment has been re-

76. Effect of delivery of bank book and order for payment of deposit.—

Foss v. Lowell, etc., Sav. Bank, 111 Mass. 285.

77. *Kimball v. Leland*, 110 Mass. 325.

78. Possession of passbooks under a parol gift.—So held where the by-laws of the bank also provided that payments to persons producing bank books should be valid, and that possession of a book should warrant payment. *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. Rep. 4, 52 N. Y. S. 189, 27 Civ. Proc. R. 263.

79. Account changed to name of depositor and her son.—Decree, *Schipers v. Kempkes* (N. J.), 67 Atl. 1042,

affirmed in 72 N. J. Eq. 948, 73 Atl. 1118.

80. Gifts causa mortis.—*Walsh v. Bowery Sav. Bank*, 7 N. Y. S. 669, 15 Daly, 403, 28 N. Y. St. Rep. 402, affirming judgment 7 N. Y. S. 97.

81. *Farmer v. Manhattan Sav. Inst.*, 60 Hun 462, 15 N. Y. S. 235; *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603, affirming 67 App. Div. 619, 73 N. Y. S. 1145.

82. *Farmer v. Manhattan Sav. Inst.*, 60 Hun 462, 15 N. Y. S. 235; *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603, affirming 67 App. Div. 619, 73 N. Y. S. 1145.

corded in the surrogate's office, where there are no creditors in the state.⁸³

Waiver of Claim against Bank.—One having a valid claim against a bank to money deposited by another in his own name, may, after the death of the depositor, lose such claim by waiver.⁸⁴

§ 301 (6) Contributory Negligence of Depositor.—As to the effect of a by-law or rule of the bank requiring a depositor to give notice of his passbook being lost or stolen, see ante, "Payment to One Wrongfully in Possession of Passbook," § 301 (4). Where a bank in good faith pays money deposited with it to one who is not authorized to receive it, the depositor can not recover from the bank the amount so paid, if his contributory negligence has been the proximate cause of his loss.⁸⁵ But where the by-laws of a bank printed in the passbook of a depositor provide that money deposited will be paid only to the depositor, or to his order, or to his legal representative, upon presentation of the passbook, and the bank negligently

83. Payment to administrator appointed in another state.—*Maas v. German Sav. Bank*, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689.

84. Claim held to have been waived.—A. first learned, after his wife's death, that she had deposited his money in a savings bank in her own name. He learned the fact from the cashier of the bank, who informed him of it upon his ordering the cashier not to pay out any of his money, as he could not find the bank book. The cashier advised him to procure the appointment of some one as administrator, which A. did, and the person so appointed demanded and received, as administrator, the amount. Held, that A. had no claim against the bank; that, if his notification to the cashier would have given him any claim, it must be deemed to have been waived. *McDermott v. Miners' Sav. Bank*, 100 Pa. 285.

85. Contributory negligence precluding recovery from bank.—Plaintiff, deposited money in a bank in the name of a third party, giving his name as that of the third party, leaving with them a deposit slip in which he recorded his name as that of the third party, and giving his place of residence and other information. Such third party, having learned of the deposit, drew out a part of the money. Held, that plaintiff could not recover against the bank; he being guilty of negligence in making his deposit, and the bank having acted in good faith and without knowledge that the money belonged to plaintiff. *Arkofsky v. State Sav. Bank*, 91 Minn. 440, 98 N. W. 326, 103 Am. St. Rep. 519.

In an action by a depositor against

a savings bank to recover the deposit after the bank has paid it out to the wrong person, who had presented the passbook, and correctly answered the test questions written in the signature book at the time the deposit was made, where the evidence, though it might be sufficient to require the submission to the jury of the question of defendant's negligence, shows that the information which enabled the person to correctly answer the test questions was given by plaintiff in response to a letter of inquiry from a stranger, it is proper for the court to direct a verdict for defendant, since plaintiff's contributory negligence was the proximate cause of the loss. *Wall v. Emigrant, etc., Sav. Bank*, 64 Hun 249, 19 N. Y. S. 194, 46 N. Y. St. Rep. 601.

Where a depositor in a savings bank was negligent in the care of the passbook by consenting that the same might be delivered to a third person, who, on presenting the passbook and checks in the depositor's name, obtained the deposit, the loss of the deposit resulted primarily from the depositor's negligence, and the bank was not liable unless its officers were negligent. *Campbell v. Schenectady Sav. Bank*, 114 App. Div. 337, 99 N. Y. S. 927.

Facts held not to constitute negligence.—Where plaintiff was shot by the man who stole the passbook, and remained helpless until the next day, when he endeavored to look after his valuables, but the bank had paid the money the same day, before plaintiff discovered the theft of the book, his failure to notify the bank of such theft was not negligence. *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096.

pays a deposit on forged orders to one who has fraudulently obtained the passbook from the owner, it will not be relieved from liability by showing that the owner was negligent.⁸⁶ And where the by-laws of a bank provide that, in order to draw out money, the passbook must be presented at the bank, and that absent depositors can withdraw their deposits on their order or check properly witnessed, the bank is liable to a depositor for money paid on forged checks, to one who has possession of the passbook of the depositor, which are not witnessed as required by the by-laws, regardless of whether the depositor was guilty of contributory negligence, in parting with the custody of the book, as it is a case of mispayment in violation of the published regulations of the bank.⁸⁷

§ 301½. Assignment of Deposits.—As to the rights of the assignee of a deposit after the death of the depositor, see ante, "Payment on Death of Depositor," § 301 (5). The passbook of a savings bank is not a negotiable instrument,⁸⁸ and its possession, in itself, constitutes no evidence of a right to draw money thereon.⁸⁹ A passbook is not rendered a negotiable instrument by an order, signed by the depositor, directing payment to a third person;⁹⁰ nor by a by-law of the bank, assented to by its depositors, providing that the passbook of each depositor containing his account shall be transferable to order.⁹¹ But a depositor may assign or transfer his interest in his deposit for a valuable consideration, without the delivery of the passbook.⁹² Transfer of the passbook and the giving of an order for the bank

86. When depositor's negligence will not relieve bank from liability.—

Chase v. Waterbury Sav. Bank, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329. See, also, *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016.

87. *People's Sav. Bank v. Cupps*, 91 Pa. 315.

88. Passbook not a negotiable instrument.—*Witte v. Vincenot*, 43 Cal. 325; *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300, 22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; *Mills v. Albany Exch. Sav. Bank*, 28 Misc. Rep. 251, 59 N. Y. S. 149.

89. *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653.

90. A stranger, H., presented for deposit at defendant savings bank a check on another bank, and received two passbooks, a portion of the amount being entered in each. The check proved to be fraudulent. Held, that the passbook, issued by the savings bank, was not rendered a negotiable instrument by an order, signed by the pretended depositor, directing payment to a third person. *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300,

22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323.

91. *Witte v. Vincenot*, 43 Cal. 325.

92. Interest in deposit may be assigned without delivery of passbook.—*Order* 114 App. Div. 626, 99 N. Y. S. 989, affirmed. *Augsbury v. Shurtliff*, 190 N. Y. 507, 83 N. E. 1122.

Rules not precluding depositor from passing demand by gift inter vivos.—

Rules of a savings bank that "drafts sent by mail or otherwise will not be entitled to payment unless the deposit book is produced, and the depositor sends, by letter accompanying the draft, correct answers to the questions asked when the first deposit was made in the bank;" that "on the decease of the depositor the amount standing to the credit of the deceased shall be paid to his or her legal representative;" and that "drafts may be made personally, or by the order in writing of the depositor, if the bank have the signature of the party on their signature book, or by letters of attorney duly authenticated"—do not prevent the depositor, as a creditor of the bank, from passing the demand by gift inter vivos. *Gammond v. Bowery Sav. Bank*, 8 N. Y. S. 856, 15 Daly, 483, 26 N. Y. St. Rep. 136, affirming judgment 7 N. Y. S. 321, 26 N. Y. St. Rep. 930.

to pay the amount of the deposit on production of the book import a consideration.⁹³ The delivery of a savings bank book, although unaccompanied by a written assignment, and with the intention only that it shall be held as collateral security for the payment of a debt, transfers an equitable title to the deposit represented by the book, which will prevail against a subsequent attachment of it by trustee process.⁹⁴ An order on a savings bank, made by a depositor in favor of a third person, for a good consideration, for the amount due him in his bank book, although accepted by the bank "except the amount trusteed," is a valid assignment, taking effect when delivered, of all the depositor's funds then held by the bank, and will prevail against the trustee process.⁹⁵ An assignment of a savings bank account, which has been completed between the parties by the execution and delivery of a writing as required by statute, is valid, though not delivered to the bank as the statute requires until after the assignor's death.⁹⁶ After an assignment of a deposit, if the bank, with knowledge thereof, pays it to one other than the assignee, it will be liable to the assignee for the fund so paid.⁹⁷ No depositor can convey to another any greater right in the funds of the bank than he has himself, and any defense on the part of the bank which is good against the original depositor is equally good against his assignee, unless there are facts to create an estoppel.⁹⁸ Where a passbook is obtained from a bank by depositing a forged check and assigned as security for a loan, the assignee, if he has been guilty of negligence, and is not a bona fide holder of the passbook, can not recover from the bank the amount standing to the credit of his assignor in such book.⁹⁹

93. From what consideration will be imported.—*McGuire v. Murphy*, 107 App. Div. 104, 94 N. Y. S. 1005.

94. Delivery of bank book with intention that it be held as collateral security.—*Taft v. Bowker*, 132 Mass. 277.

95. Order in favor of a third person.—*Kingman v. Perkins*, 105 Mass. 111.

96. Written assignment not delivered to bank until after assignor's death.—*Stacks v. Buten*, 141 Wis. 235, 124 N. W. 403, construing *Sanborns St. Supp.* 1906, § 2319c, as amended by Laws 1901, p. 563, c. 390.

97. Liability of bank for paying to one other than assignee.—D. assigned her deposit in a savings bank to plaintiff, in trust for certain purposes, at the same time giving him her deposit book. The bank objected to the form of this assignment, and it was agreed between it and plaintiff that it should pay no attention thereto till it heard from him further. Subsequently D. obtained the book from plaintiff, under the pretext that she wished to examine it, and then delivered it, together with an assignment of the fund, to B., who collected the fund from the bank, and immediately redeposited it by itself in her

own name as "trustee for D." Plaintiff then notified the bank that he claimed the fund under his earlier assignment, but the bank paid it to B. Held, that the bank was liable to plaintiff for the fund so paid to B. with knowledge of the former's claim thereto. *McCarthy v. Provident Inst.* 159 Mass. 527, 34 N. E. 1073.

98. Depositor can not convey greater right than he has himself.—*McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300, 22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323.

A woman's money was deposited in the name of herself by her husband as agent. It was paid out from time to time on presentation of the pass book, sometimes to her, sometimes to him. She knew of his drafts, and some of the money drawn by him was used for her. Held, that the bank was not liable to her assignee, even independently of its by-law, providing that it should be discharged by payments made on presentation of the book. *Wilcox v. Onondaga County Sav. Bank* (N. Y.), 40 Hun 297.

99. Negligence precluding assignee from recovering on passbook fraudu-

§ 302. Investments, Loans, and Discounts—§ 302 (1) In General.—Power to Deal in Commercial Paper.—One of the basic functions of banking is the dealing in notes, bills or exchange, and credits.¹ Ordinarily incidental powers essential to the execution of those expressly conferred by statute will be implied, and hence, in the absence of limitation, the authority to “discount, purchase, sell, and make loans upon commercial paper, notes,” etc., carries with it the power to employ the means and assume the obligations customary in such transactions, and savings banks in dealing with such paper may incur such liability in transferring it as is customary under the law merchant.²

§ 302 (2) Investments.—Under the power conferred by statute, on savings and loan corporations, to “invest” the funds of their members, stockholders, and depositors, they may use their funds to buy interest-bearing notes and mortgages.³ Under authority to purchase notes, a savings bank can make a contract for the purchase of notes, notwithstanding a statutory provision prohibiting such banks from contracting any debt except for deposits and necessary expenses of management.⁴ A statute prohibiting savings banks from loaning money on notes, drafts, or other personal security, does not necessarily render void the purchase of notes by a savings bank.⁵ In some states savings banks are authorized by statute to purchase

lently obtained.—*McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300, 22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323.

A stranger, H., presented for deposit at defendant savings bank a check on another bank, and received two pass-books, a portion of the amount being entered in each. The check was a forgery, and the bank published notice thereof. Afterwards H. presented one of the books to plaintiff, requesting a loan thereon. Plaintiff declined, but afterwards gave to a bank there his draft, accepted by H., and indorsed by himself. The bank discounted the draft for H., and took the book, with his order for collection. On learning that the book was obtained by fraud, the bank returned it to plaintiff, who paid the draft. Held, that plaintiff was guilty of negligence, and was not a bona fide holder of the book. *McCaskill v. Connecticut Sav. Bank*, 60 Conn. 300, 22 Atl. 568, 13 L. R. A. 737, 25 Am. St. Rep. 323.

1. Power to deal in commercial paper.—*Carroll v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937.

2. *Carroll v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937.

An Iowa statute, Code, 1897, § 1850, subd. 5, authorizes savings banks to “discount, purchase, sell, and make

loans upon commercial paper,” etc. Section 1851 empowers them to purchase places of business and convey any realty that may be acquired. Section 1855 provides that no savings bank shall contract any debt or liability for any purpose whatever, except for deposits and the necessary expenses of managing its business, etc. Held, that § 1855, construed with the other sections on the same subject, was intended to prohibit the creation of any indebtedness or liability except as authorized in the other sections and for purposes therein named, and does not curtail the power under § 1851 to deal in commercial paper, by forbidding the assumption of obligations incident thereto, and hence the banks may guarantee and indorse such paper in transferring it. *Carroll v. Corning State Sav. Bank*, 139 Iowa 338, 115 N. W. 937.

3. Power to “invest” funds.—*Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914, construing Civ. Code, § 571.

4. Statute not negating authority to purchase notes.—*Ubbinga v. Farmers' Sav. Bank*, 108 Iowa 221, 78 N. W. 840.

5. Statute not necessarily rendering void the purchase of notes.—*Citizens' Sav. Bank v. Couse*, 68 Misc. Rep. 153, 124 N. Y. S. 79, construing Banking Law (Consol. Laws, c. 2), § 150.

mortgages. Some of these statutes have been interpreted by the courts.⁶ In New Jersey the court of chancery is, by statute, given guardianship over savings banks, and such a bank can invest in mortgages only under authority from that court.⁷ A subscription, by the trustees of a savings institution, to the capital stock of another corporation, at a time when they have no funds to pay therefor, is *ultra vires*.⁸ By statute, in New York, savings banks are authorized to keep ten per cent of their deposits on deposit in any incorporated bank.⁹

§ 302 (3) Loans and Discounts—§ 302 (3a) Power to Loan and Discount.—A charter conferring on a savings institution the power to invest deposits made with it in public stocks or "other securities," authorizes the lending upon bills, bonds, notes, and mortgages, as well as stocks, and also the power of making loans by way of discount.¹⁰ Authority to "invest in personal security" empowers a bank to loan money on paper, discount bills of exchange, notes, drafts, etc., and not to loan on chattel mortgages.¹¹ A charter authorizing the trustees to keep one-third of the deposits to meet payments, "and which may by them be kept on deposit on interest or otherwise, in such available form as the trustees may direct," does not authorize the trustees to loan the funds on notes and mortgages.¹² Under the authority given to a bank to keep its available funds "on deposit, on

6. Interpretation of statutes authorizing purchase of mortgages.—The exception by the California Statute, Civ. Code, § 574, subd. 5, of mortgages on real estate from personal property which it prohibited savings and loan corporations from purchasing, implies that they are authorized to purchase such mortgages; and the authority to do so necessarily carries with it the right to purchase obligations secured thereby. *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914.

Whether the purchase of a mortgage is required by the purposes of the corporation, within the California Statute, Civ. Code, § 354, subd. 4, authorizing all corporations to purchase such personal estate "as the purposes of the corporation may require," not exceeding limitations thereon, is to be determined by its board of directors, by whom, as provided by § 305, its corporate powers are exercised; and it is not open to investigation at the instance of the mortgagor. *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914.

7. In New Jersey investments in mortgages must be under authority from chancery court.—In addition to the requirements of Laws 1878, p. 393, "for the better security of depositors in savings banks," there must be, when a bank, a ward of the court, invests in

mortgages, a certificate of the counsel of the bank that the title is good, and the mortgage legally valid, and also a certificate in writing by a master designated by this court approving the security as a proper and unexceptional investment of trust money. *In re Newark Sav. Inst.*, 32 N. J. Eq. 644.

8. Subscription to capital stock of another corporation.—*Franklin Co. v. Lewiston Inst.*, 68 Me. 43, 28 Am. Rep. 9.

9. In New York deposits may be deposited in any incorporated bank.—Laws 1875, c. 371, §§ 27, 28.

Therefore a contract of deposit by a savings bank with a national bank, calling for interest, does not affect an unauthorized loan, and such a contract is not a violation of the statute prescribing the securities in which investments by savings banks may be made. *Erie County Sav. Bank v. Coit*, 104 N. Y. 532, 11 N. E. 54.

10. Power to invest deposits in public stocks or "other securities."—*Duncan v. Maryland Sav. Inst. (Md.)*, 10 Gill & J. 299.

11. Authority to invest in personal security.—*Colorado Sav. Bank v. Evans*, 12 Colo. App. 334, 56 Pac. 981.

12. Charter provision not authorizing trustees to loan funds on notes and mortgages.—*Paine v. Barnum (N. Y.)*, 59 How. Prac. 303.

interest or otherwise, or in such available form as the trustees may direct," a loan on the promissory note of the borrower is authorized.¹³ Under its charter power to invest its capital in "bonds, notes, * * * and other evidences of debt," and "to hold any real estate necessary to carry on its business," a savings bank has power to loan money, and to secure the same by a trust deed.¹⁴ A savings bank does not lend on a "note" in violation of statutes, prohibiting loans on notes, bills of exchange, or other personal securities, if it lends on the security of a bond and mortgage, as well as the note.¹⁵ A savings bank empowered to discount notes may purchase such notes,¹⁶ and may purchase and hold city warrants.¹⁷ A savings bank does not "discount" a bond in violation of statute, if it pays for its full face value, not reserving interest.¹⁸ A savings bank duly incorporated, whose charter does not restrict its power to loan money upon security in or out of the state, may take and hold a mortgage upon lands in another state, and may enforce such mortgage in the courts of such state.¹⁹ Persons dealing with savings banks must take notice of their limited powers, and no recovery can be had against a bank for breach of contract in failing to make a loan, where a condition precedent to making the loan, prescribed by statute, has not been complied with.²⁰

13. Loan on promissory note of borrower authorized.—*Rome Sav. Bank v. Kramer* (N. Y.), 32 Hun 270.

14. Power to loan money and secure same by a trust deed.—*Tishomingo Sav. Inst. v. Buchanan*, 60 Miss. 496.

15. Statutes prohibiting loans on notes construed.—*Auburn Sav. Bank v. Brinkerhoff*, 44 Hun 142, 8 N. Y. St. Rep. 275, construing Laws 1875, c. 371, § 30, and Laws 1882, c. 409, § 260.

Note not security for, but evidence of, debt.—The act incorporating the Knickerbocker Savings Institution prohibited it from loaning its funds on mere personal securities. It made a loan, for which it took the borrower's note, and a pledge of stocks in the Knickerbocker Bank. The savings institution failed. The plaintiff was appointed receiver, and instituted a suit on the note. Held, that the note was not security for, but evidence of, the debt, and that the loan was not a violation of the act. *United States Trust Co. v. Brady* (N. Y.), 20 Barb. 119.

Notes discounted void, but mortgage enforceable as valid security for loan.—The New York Statute, Laws 1868, c. 816, chartering the People's Safe-Deposit & Savings Institution, did not empower it to loan money on personal security, and 1 Rev. St., p. 712, §§ 3, 6, prohibited it from discounting commercial paper; but its charter (§ 11) authorized it to invest in bonds and mortgages. On foreclosure of a mort-

gage given to secure the institution for any indebtedness it had against E. upon "any promissory note, bill of exchange, overdraft, or otherwise," held, that notes given by E. after the bond and mortgage, and discounted by the institution for a loan, were void, but that the mortgage was enforceable as a valid security for the loan. *Pratt v. Eaton*, 79 N. Y. 449, reversing 18 Hun 293.

16. Authority to discount notes authorizes their purchase.—*Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183.

17. Authority to discount notes authorizes purchase of city warrants.—*Aull Sav. Bank v. Lexington*, 74 Mo. 104.

18. Transaction not violative of statutory prohibition against discounting bonds.—*Auburn Sav. Bank v. Brinkerhoff*, 44 Hun 142, 8 N. Y. St. Rep. 275, construing 1 Rev. St., p. 600, § 4.

19. Power to take mortgage upon lands in another state.—*Lebanon Sav. Bank v. Hallenbeck*, 29 Minn. 322, 13 N. W. 145.

20. Condition precedent to making loan not complied with.—A contract by a savings bank to lend money on mortgage security can not be made the basis of an action for a breach in failing to make the loan, when there is no report in writing by at least two members of the bank's board of investment, together with their certificate of

§ 302 (3b) Loans and Discounts in Contravention of Statutory Prohibitions.—A statute prohibiting savings banks from loaning money on personal security is directory to the trustees, and designed for the protection of the depositors,²¹ and if a bank receives corporate stock as a pledge for a loan, its title thereto is merely voidable, not void.²² Such a statute will not prevent a bank from enforcing payment of a promissory note;²³ nor will it affect a bank's liability for damages, where the bank directs a broker to sell, at a price named, certain stock which it has taken to secure a loan, and after the broker's sale informs him that it has already sold the stock, and refuses to deliver it.²⁴ A savings bank which is prohibited by statute from discounting commercial paper has no right to discount such paper, and notes discounted by it are illegal and void, but such an act is simply *malum prohibitum*, and is no defense to an action against parties receiving the benefits of the illegal loan for money had and received.²⁵ Where a statute requires that real estate on which savings banks make loans shall be unincumbered, and provides that no loan shall be made except on the report of the committee, if an action is brought against the maker of a mortgage bond, on which a bank has made a loan, the defendant can not show by way of defense that the realty was incumbered by liens prior to the mortgage, or that no committee had reported on the loan.²⁶ The assignment of a mortgage to a savings bank in good faith to protect it can not be assailed because the bank is, by statute, prohibited from taking the assignment, and under its charter powers from binding itself by the accompanying agreement.²⁷ A violation of a statute, prohibiting directors and officers of savings and loan corporations from borrowing therefrom, and declaring that their offices shall immediately become vacant therefor, is available only to

the value of the premises to be mortgaged, as required by the Massachusetts statute, St. 1894, c. 317, § 21, cl. 1, as a condition precedent to the making of a loan on mortgage security. *Gilson v. Cambridge Sav. Bank*, 180 Mass. 444, 62 N. E. 728.

21. Statutory prohibition against loaning money on personal security.—*Farmington Sav. Bank v. Fall*, 71 Me. 49.

22. *Sistare v. Best*, 88 N. Y. 527, affirming 24 Hun 384.

23. *Farmington Sav. Bank v. Fall*, 71 Me. 49.

The want of power of a savings bank to discount a note can not be pleaded by way of defense to a suit on a note so discounted. *United German Bank v. Katz*, 57 Md. 128.

But in a case in a federal court, it was held that where the charter of a safe-deposit and savings institution provides in what it shall invest its funds, but gives it no power to loan

money on personal security, and the constitution and statutes expressly prohibit such corporations from doing a banking business, if the corporation loans money by discounting notes of the borrower, the loan itself, as well as the notes, is void, and the corporation can not recover for money had and received. *In re Jaycox*, Fed. Cas. No. 7,237, 12 Blatchf. 209.

24. *Sistare v. Best* (N. Y.), 16 Hun 611, construing Laws 1853, c. 257, § 6.

25. Statutory prohibition against discounting commercial paper.—*Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531, affirming 53 How. Prac. 506, construing 1 Rev. St. 712, §§ 3, 6.

26. Statutory limitation of power to make loans on real estate security.—*Auburn Sav. Bank v. Brinkerhoff*, 44 Hun 142, 8 N. Y. St. Rep. 275.

27. Statutory prohibition against taking assignments of mortgages.—*Gerrity v. Wareham Sav. Bank*, 202 Mass. 214, 88 N. E. 1084, construing Rev. Laws 1902, c. 113, § 26, cl. 1.

the sovereign power, and a loan made to a director is not invalid, and may be recovered, and a pledge securing the same held until the loan is paid.²⁸

§ 302 (3c) Amount That May Be Loaned.—A statute which provides that the total liabilities to any savings bank association of any person, firm or corporation for money borrowed shall at no time exceed 20 per centum of the capital stock of the association actually paid in, does not apply to a bond intended to indemnify the obligee association from the principal's failure to pay present and future indebtedness, not restricted to that which has been or should be incurred for borrowed money.²⁹ Such a statute does not make a loan in excess of the per centum named void.³⁰

§ 302 (3d) Time for Which Loans May Be Made.—A statute providing that a savings bank shall not make a contract or agreement to loan or extend the time of payment of a loan on personal security for a longer time than one year is not violated by an agreement extending the time of payment of a note until the payee shall be dissatisfied with the security or until payment is demanded or offered.³¹

§ 302 (3e) Requirements as to Value of Real Estate Security.—Under statutes or charter provisions in some of the states savings banks are not permitted to accept real estate as security for a loan unless it is worth double the amount of the loan.³²

§ 302 (3f) Requirement as to Additional Security When Funds Are Loaned on Stocks or Mortgages.—Where the charter of a savings bank provides that its funds shall be invested in or loaned on public stocks or private mortgages, and that, when loaned on—not invested in—such

28. Statutory prohibition against directors and officers borrowing from bank.—Order 112 Cal. 1, 44 Pac. 339, affirmed. *Brittan v. Oakland Bank*, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

29. Statutory limitation of amount that may be loaned.—*Benton County Sav. Bank v. Boddicker*, 105 Iowa 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310, construing Acts 15th Gen. Assem. c. 60, § 18.

30. *Benton County Sav. Bank v. Boddicker*, 105 Iowa 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310, construing Acts 15th Gen. Assem. c. 60, § 18.

31. Time for which loans may be made—Statute construed.—*Lyndon Sav. Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900, construing V. S. 4099.

32. Requirements as to value of real estate security.—The Colorado savings bank act, authorizing the di-

rectors to invest one-half of the deposits in personal security and in United States and other bonds and on realty worth double the loan, does not require the bonds or other security, except the realty, to be worth double the loan. *Colorado Sav. Bank v. Evans*, 12 Colo. App. 334, 56 Pac. 981.

A clause in the charter of a savings bank, providing that the bank shall invest no money "on bond and mortgage, except on real estate worth at least double the amount of the sum invested, above all incumbrances," means that such real estate shall be worth at least double the investment and double the incumbrances. *Williams v. McKay*, 46 N. J. Eq. 25, 18 Atl. 824.

There is nothing in the charter of the Maryland Savings Institution which requires two securities to be taken for money lent. *Duncan v. Maryland Sav. Inst. (Md.)*, 10 Gill & J. 299.

stocks or mortgages, "a sufficient bond or other satisfactory personal security in addition shall be required of the borrower," the promissory note of the borrower is perfectly lawful, and, though secured merely by a pledge of bank stock, is valid.³³

§ 302 (3g) Usury.—A savings bank, unless authorized to do so by its charter, or by statute, can not charge a higher rate of interest on loans than that allowed by law.³⁴ Where a bank discounts a note at a usurious rate of interest, the transaction is not entirely void, but void only as to the excess of interest over the legal rate.³⁵

§ 303. Interest and Dividends on Deposits—Dividends Distinguished from Interest.—Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself makes or loses in lending their money, but receive a share of such profits as the bank, by lending their money, makes, after deducting expenses, etc., such share of profits is a dividend, and not interest.³⁶

Out of What Funds Dividends May Be Paid.—Interest on loans and investments of a savings bank, accrued but not paid, though secured by mortgages, and drawing interest, can not enter into the dividends which savings banks are authorized to make out of their "surplus profits," since profits must consist of earnings actually received.³⁷

Agreement as to Time and Amount of Payments.—A savings bank, if it pays interest to its depositors, can agree at what time it will pay interest and in what amounts.³⁸

Agreement by Special Depositor Not to Draw Out Interest.—An agreement between a savings bank and a special depositor that he will not

33. Requirement as to additional security when funds are loaned on stocks or mortgages.—*Mott v. United States Trust Co. (N. Y.)*, 19 Barb. 568.

34. Charter not authorizing more than legal rate of interest.—The Dollar Savings Bank of Atlanta has no authority, under its charter, to charge interest at a higher rate than that allowed by law. *Candler v. Corra*, 54 Ga. 190.

Constitutionality of statute allowing interest at more than legal rate.—Though a loan upon which interest is calculated at the highest lawful rate for the full period thereof, and the aggregate of the principal and interest calculated, is divided into as many notes as the period embraces months, one of such notes maturing each month, is usurious, yet an act allowing "all savings institutions which pay interest to depositors, and whose deposits are not subject to check," to make such loans and declaring them not usurious, is a general law and not

repugnant to the constitutional prohibition against special or local laws. *Union Sav., etc., Trust Co. v. Dottenheim*, 107 Ga. 606, 34 S. E. 217.

There is a dictum, however, in the case of *Union Sav., etc., Trust Co. v. Dottenheim*, 107 Ga. 606, 34 S. E. 217, to the effect that such a special provision in a particular bank charter would be unconstitutional.

35. Effect of discounting note at usurious rate of interest.—*Chafin v. Lincoln Sav. Bank*, 54 Tenn. (7 Heisk.) 499.

36. Dividends distinguished from interest.—*Cary v. Savings Union (U. S.)*, 22 Wall. 38, 22 L. Ed. 779.

37. Dividends out of "surplus profits"—"Surplus profits" defined.—*People v. San Francisco Sav. Union*, 72 Cal. 199, 13 Pac. 498, construing Act of April 11, 1862.

38. Agreement as to time and amount of payments.—*Dottenheim v. Union Sav. Bank, etc., Co.*, 114 Ga. 788, 40 S. E. 825.

draw out the interest due on his deposits, and allow it to remain and draw interest as new principal, is not illegal or void, as *ultra vires*.³⁹

Statutory Regulations and Restrictions.—In some states there are statutory regulations and restrictions as to the interest and dividends to be paid by savings banks on deposit, and some of these statutes have been interpreted by the courts.⁴⁰ A savings bank incorporated under a special act is not bound by the provisions of a statute enacted prior thereto, regulating the amount of interest to be paid on deposits, if such provisions are incompatible with the provisions of the special act.⁴¹

Interest Recoverable by Donee of a Deposit.—Where a savings bank contracts to pay four per centum upon a deposit, and the deposit is made the subject of a gift mortis causa, and the donee sues the bank, interest at the rate of four per centum only is to be computed to the date of judgment.⁴²

Effect of a Depositor's Withdrawal of Reduced Amount Where Deposits Are Scaled.—Under a statute which makes the depositors of an insolvent savings banks, when their deposits are scaled, the equitable owners in common of the property of the bank, a depositor's withdrawal of the re-

39. Agreement by special depositor not to draw out interest.—Heironimus *v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333; *Edwards v. Sweeney*, 83 Md. 146, 34 Atl. 823.

40. Statutory restrictions on amount of interest or dividends.—Under New Jersey statutes, Laws 1876, p. 341, and 1878, p. 393, a savings bank can not divide more than 5 per cent per annum among its depositors, until after its surplus exceeds 15 per cent of its deposits. In *re Provident Inst.*, 30 N. J. Eq. 5.

A Connecticut statute, Gen. St. 1902, § 3440 declares that the net income of any savings bank in excess of one-eighth of 1 per cent of its deposits actually earned during the preceding six months may be divided among its depositors, but that no dividend shall exceed 4 per cent per annum, except as provided in § 3441, which declares that no dividend shall be made, except as provided in § 3440, until the bank's surplus equals 3 per cent of its deposits, that such banks shall not carry a contingent fund of more than 10 per cent, and that any surplus beyond that amount shall be divided among depositors. Held, that such sections did not militate against the right of depositors of a non-stock savings bank to its income or profits, which are to be regarded as a part of the deposits. *Bank Comm'rs v. Watertown Sav. Bank*, 81 Conn. 261, 70 Atl. 1038.

Interest on deposits that are in excess of the statutory limit.—Under the New York statute, Laws 1885, c. 477, declaring that Laws 1882, c. 409, § 290, limiting the amount of any individual deposit or deposits, shall not be construed as prohibiting the credit of interest on accounts which may have reached the maximum limit, provided that thereafter no interest shall be allowed on such increase, a depositor whose deposits are in excess of the limit can not recover interest on such excess. *Taylor v. Empire State Bank*, 66 Hun 538, 21 N. Y. S. 643, 50 N. Y. St. Rep. 269.

41. Bank not bound by provisions of a previous statute incompatible with its charter.—A savings bank incorporated under a special act passed in 1859 was sued by a depositor for the 1 per cent additional interest required by Laws 1853, p. 550, c. 257, to be paid on deposits under \$500, above that paid on larger deposits. Held, that the bank, having been incorporated in 1859, was not bound by the provisions of the previous statute of 1853, incompatible with its charter; and as, by the later act, its trustees were empowered to regulate the rate of interest to be paid on all deposits without distinction, and had fixed a uniform rate, the action must fail. *Werner v. German Sav. Bank (N. Y.)*, 2 Daly 406.

42. Interest recoverable by donee of a deposit.—*Pierce v. Boston, etc., Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371.

duced amount is not a gift of his share of the property to the other depositors. The latter, however, on the winding up, may claim interest.⁴³

Right to Surplus after Payment of Depositors.—Where a savings institution, whose charter provides that the depositors shall receive as interest their ratable proportions of the profits, after deducting expenses and retaining a reasonable surplus or contingent fund, and that neither the bank nor its managers shall receive any benefit from any deposit, or the produce thereof, goes into voluntary liquidation, and after paying all of its depositors, has a surplus in hand, such surplus belongs to those depositors only who had deposits when the winding-up proceedings were commenced, and to the exclusion of all those who withdrew their deposits prior to that time, and will be distributed among them ratably according to the amount of their respective deposits.⁴⁴

§ 304. **Losses.**—As to losses where insolvency proceedings are had, see post, "Insolvency and Receivers," § 309.

By Whom Losses Must Be Borne.—Where a savings bank is incorporated, for the purpose of receiving deposits to be used to the best advantage, the income to be divided among the depositors, and the officers receiving no compensation, there is no absolute promise to repay to any depositor the full amount of his deposit, and, in case of loss from an investment carefully and lawfully made, it must be borne pro rata by the depositors.⁴⁵ Where, under the by-laws of a savings bank, the depositors stand on an equality, though only profits are spoken of in them, and in statements on the books given to depositors, by intendment of law, losses are to be shared equally.⁴⁶ As a savings bank, in the ordinary course of business, is only an incorporated agency for receiving and investing money of depositors, if a loss of deposits is incurred, one depositor can not recover from the bank his share of the loss.⁴⁷

Mode of Paying Reduced Deposits.—The court can not order the sums to which the deposits of a savings bank are reduced under the Maine statute⁴⁸ to be paid by installments.⁴⁹

- **Assumption, after Fifty Years, That Apportionment of Loss Was Just and Notice Thereof Given.**—Where, by vote of the officers of a savings bank, 5 per cent. was deducted from the accounts of all depositors, on account of a loss by the bank, and three days later a depositor withdrew her deposit from which the discount was made, and the account was balanced

43. Effect of a depositor's withdrawal of reduced amount where deposits are scaled.—In re Francetown Sav. Bank, 63 N. H. 138, construing Gen. Laws, c. 170.

44. Right to surplus after payment of depositors.—Morristown Inst. v. Roberts, 42 N. J. Eq. 496, 8 Atl. 315.

45. By whom losses must be borne.—Lewis v. Lynn Inst., 148 Mass. 235,

19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785.

46. Lewis v. Lynn Inst., 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785.

47. Bunnell v. Collinsville Sav. Soc., 38 Conn. 203, 9 Am. Rep. 380.

48. Laws 1877, c. 218, § 36.

49. Mode of paying deposits reduced under Maine statute.—In re Newport Sav. Bank, 68 Me. 396.

on the books of the bank, in a suit by the depositor's administrator 50 years after, to recover the amount of the discount, it will be assumed that the apportionment was just, that notice was given to the depositors, and that it was known to the depositor or her attorney to whom the money was paid.⁵⁰

§ 305. Repayment of Deposits.—Right to Sue for Money Deposited to Be Repaid at Certain Times.—Money deposited with a savings institution, to be repaid at certain times prescribed by the institution, may, on demand, in pursuance of the by-laws, be sued for in *assumpsit*; and it affords no defense that the institution, having, in accordance with its by-laws, invested its funds in stocks which have depreciated, is unable to pay the whole amount received.⁵¹

A savings bank unjustifiably refuses to pay a deposit if, although the name of the depositor was an assumed one, his identity is shown by possession of the passbook, and an affidavit of the fact.⁵²

A party who converts a savings-bank book obtains no title to the deposits, and the true owner may sue to recover the money deposited.⁵³

Statutes, By-Laws and Rules Requiring Production of Passbook.—The by-laws or rules of savings banks generally contain a provision which, in substance, if not in exact phraseology, declares that deposits will not be paid except on production of the passbook. Such a requirement is for the benefit of the bank,⁵⁴ and is reasonable,⁵⁵ and when printed in a passbook is part of the contract between the bank and the depositor;⁵⁶ and the latter can not recover his deposit without producing either the book, or evidence of its loss.⁵⁷ The framing and hanging of such by-laws or rules in

50. Assumption, after fifty years, that apportionment of loss was just and notice thereof given.—*Lewis v. Lynn Inst.*, 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785.

51. Right to sue for money deposited to be repaid at certain times.—*Makin v. Institution*, 19 Me. 128, 36 Am. Dec. 740. See, also, *Makin v. Savings Inst.*, 23 Me. 350, 41 Am. Dec. 389.

52. When bank is not justified in refusing to pay deposit.—*Davenport v. Savings Bank (N. Y.)*, 36 Hun 303.

53. One converting book obtains no title to deposit.—*Newman v. Munk*, 36 Misc. Rep. 639, 74 N. Y. S. 467.

54. Requirement is for benefit of bank.—*Mills v. Albany Exch. Sav. Bank*, 28 Misc. Rep. 251, 59 N. Y. S. 149.

55. Requirement is reasonable.—*Rosenthal v. Dollar Sav. Bank*, 61 Misc. Rep. 244, 113 N. Y. 787; *Warhus v. Bowery Sav. Bank*, 12 N. Y. Super. Ct. 67, affirmed in 21 N. Y. 543.

A savings bank's regulation that the deposit will be paid only upon production of the passbook is reasonable

with the qualification that proof of its loss, or that the fact that it can not be found after due search, will entitle the depositor to draw his deposit without it. *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543, affirming 12 N. Y. Super. Ct. 67.

56. Part of contract between bank and depositor.—*Wall v. Provident Inst. (Mass.)*, 3 Allen 96; *Warhus v. Bowery Sav. Bank*, 12 N. Y. Super. Ct. 67, affirmed in 21 N. Y. 543.

Where, in a book used as evidence of deposits in a savings bank, was the following clause: "Depositors are alone responsible for the safe-keeping of the book, and the proper withdrawal of their money. No withdrawal will be allowed without the book, and the book is the order for the withdrawal" —it was held that the clause made part of the contract between the bank and the depositor. *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194.

57. Production of book or evidence of its loss essential.—*Warhus v. Bowery Sav. Bank*, 12 N. Y. Super. Ct. 67, affirmed in 21 N. Y. 543.

several conspicuous places in the banking room, as required by the charter of the corporation, is constructive notice to all depositors of their contents.⁵⁸ But such a by-law can not be applied to a depositor who is unable to produce his book by reason of its loss, destruction, or the wrongful retention thereof by another.⁵⁹ And where it is undisputed that the bank book of a depositor has been stolen, it will not defeat an action by him to recover a balance to his credit in the bank that he is unable to produce the book, though there is a statutory requirement that no savings bank may make any payment except on production of the book.⁶⁰ The provisions of a statute and rules of a bank made pursuant thereto, that deposits shall not be paid to any person unless the depositor's passbook be produced, are binding on an assignee of a deposit made in the name of the assignor and his wife and payable to either of them, and the assignee's failure to produce the passbook, though caused by the wife's refusal to surrender it, justifies the bank in refusing payment to him.⁶¹ The by-laws of some banks which provide that no depositor shall receive any part of his principal or interest without producing his original deposit book, make an exception to the rule where it is proved to the satisfaction of the officers of the bank that the book has been lost.⁶² Under such a statute the test of whether the book has been lost or not is not the arbitrary decision of the trustees or treasurer, but the mind of a reasonable man.⁶³

When Bank May Require Indemnity as a Condition of Payment.—

Though the duty devolves upon a bank's officers to exercise care to protect depositors from fraud, and they are not absolved from liability for dis-

58. Constructive notice of contents of by-laws and rules.—*Warhus v. Bowery Sav. Bank*, 12 N. Y. Super. Ct. 67, affirmed in 21 N. Y. 543.

59. Effect of loss, destruction or wrongful retention of book.—*Palmer v. Providence Inst.*, 14 R. I. 68, 51 Am. Dec. 341.

Notwithstanding a provision in a savings bank charter and by-law that a deposit shall not be paid unless the book be produced, the depositor's administrator may recover the deposit from the bank if the book is withheld from him by the depositor's family. *Palmer v. Providence Inst.*, 14 R. I. 68, 51 Am. Rep. 341.

And where a deposit book has been destroyed by fire, the depositor's administrator is thereby excused from producing it. *Hudson v. Roxbury Inst.*, 176 Mass. 522, 57 N. E. 1012.

60. Statute requiring production of book—Effect of book being stolen.—*Kenney v. Harlem Sav. Bank*, 61 Misc. Rep. 144, 114 N. Y. S. 749.

61. Regulation binding on assignee of deposit.—*Rosenthal v. Dollar Sav. Bank*, 61 Misc. Rep. 244, 113 N. Y. S. 787, construing Banking Law (Laws

1892, pp. 1895, 1899, c. 689), §§ 113, 122.

62. Statutory exception to rule where book is proved to have been lost.—*Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314, 71 N. E. 567.

By-laws not precluding suit by depositor where book is lost.—A by-law of a savings bank declared that no person should have the right to demand any part of the principal or interest of his deposit without producing the original deposit book, that payments might be entered therein. Another by-law declared "that, should any depositor lose his book, he is required to give immediate notice thereof to the institution, and, in cases of doubt as to the identity of the depositors or claimants, the board may require such testimony and security as they may deem necessary." Held, that such by-laws did not signify that if the deposit book was lost its non-production was a bar to the right of the depositor to demand and sue for his deposit. *Wagner v. Howard Sav. Inst.*, 52 N. J. L. 225, 19 Atl. 212.

63. Test of whether book has been lost.—*Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314, 71 N. E. 567.

regarding constructive notice thereof when paying a person in possession of a passbook, they can not require a bond of indemnity or absolute security as a condition of payment.⁶⁴ Where the identity of the depositor with the intestate is admitted by the bank, and the deposit book is shown to have been destroyed in a fire, the administrator can not be required to furnish a bond of indemnity as a condition of payment.⁶⁵ But where a depositor's bank book contains a provision that no withdrawal will be allowed without the book, which is made the order of withdrawal, a depositor who has lost his book can not recover his deposit of the bank upon evidence of such loss without offering indemnity.⁶⁶ Where a by-law of a bank, which is printed in its deposit books, provides that "no person shall receive any part of their principal or interest without producing the original book," an administrator of a depositor can not maintain an action against the bank for the deposit, without producing the book, or tendering in lieu thereof a satisfactory bond of indemnity.⁶⁷ But it has been held that a statute which declares that no payment or check against any savings account shall be made unless accompanied by and entered in the passbook, except for good cause shown and on assurances satisfactory to the officers of the bank, does not authorize a refusal to pay unless the book is presented or indemnity given, where the passbook is not negotiable, the demand is made by the duly qualified administrator of the depositor's estate, and no other demand has been made, though several months intervened between the death and the demand made.⁶⁸ A by-law of a bank, providing that, "in case of lost books, the bank will decide as to the persons to whom payment shall be made," does not authorize a refusal to pay unless the book is presented or adequate indemnity given, where notice of the loss of the book was given more than seven years before the commencement of action, and no claim had been made for the deposit, except by the depositor and her executor.⁶⁹ Where a by-law of a bank,

64. Indemnity can not be required of one in possession of passbook.—*Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. Rep. 4, 52 N. Y. S. 189, 27 Civ. Proc. R. 263.

If money is deposited in a savings bank by an agent in the name of his principal, and the agent receives from the bank a deposit book in which the principal is credited with the deposit, the principal, upon giving sufficient proof of ownership, is entitled to be paid the amount of the deposit, and he may maintain an action therefor without tendering a bond indemnity. *Wallace v. Lowell Inst.* (Mass.), 7 Gray 134.

And this is so, although it is the custom of the bank to require depositors to sign their names when making their first deposit, and not to receive any deposits by one person for the benefit of another unless so entered in

their books. *Wallace v. Lowell Inst.* (Mass.), 7 Gray 134.

65. Where book destroyed in fire administrator not required to furnish indemnity.—*Hudson v. Roxbury Inst.*, 176 Mass. 522, 57 N. E. 1021.

66. Indemnity required where book is lost and rules require production of book.—*Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194.

67. Requirement that book be produced—Indemnity by administrator.—*Wall v. Provident Inst.* (Mass.), 3 Allen 96.

68. Vincent v. Port Huron Sav. Bank, 147 Mich. 437, 111 N. W. 90.

Under such statute the question of "good cause" and "satisfactory assurance" is for judicial triers, not the officers of the bank. *Vincent v. Port Huron Sav. Bank*, 147 Mich. 437, 111 N. W. 90.

69. By-law not authorizing bank to

printed in its passbooks, provides that deposits will not be paid except on production of the book, except that in case of loss of the book payment will be made upon satisfactory proof and adequate indemnity, if the book is lost the deposit can be recovered only when security is furnished.⁷⁰ Such a by-law is reasonable.⁷¹

Order by Depositor to Allow His Wife to Draw Deposit.—An order by a depositor on the treasurer of a savings bank to allow the depositor's wife, naming her, to sign the bank's books, and to draw any and all money standing in his name as a depositor, is upon its face no more than an authority to the wife to receive money for the depositor.⁷²

Right to Recover Money Deposited in Excess of Amount Bank Is Entitled to Receive.—A statute making it unlawful for a savings bank to receive from any person a deposit in excess of a certain amount, does not prevent such a person from recovering money deposited by him in excess of that amount.⁷³

Estoppel to Deny Liability to Repay Depositors.—Where a savings bank takes a depositor's money as a special deposit, and converts it to its use, and enjoys gratuitous benefits therefrom, it is estopped from denying its liability to repay the money, whether the receiving of the money as such deposit was ultra vires or not.⁷⁴ A savings bank is not estopped to claim that it was not authorized by its charter to receive for safe-keeping United States bonds delivered to a clerk of its treasurer, when neither the bonds nor their avails have come to its possession.⁷⁵

Waiver of Defense by Bank.—In a suit against a savings bank for its refusal to pay a deposit, the bank can not set up as a defense that the plaintiff had not complied with the by-laws of the bank by showing a written

require indemnity where book is lost. —*Mills v. Albany Exch. Sav. Bank*, 28 Misc. Rep. 251, 59 N. Y. S. 149.

70. By-law requiring indemnity where book is lost.—*Wall v. Provident Inst. (Mass.)*, 3 Allen 96; *S. C.*, 6 Allen 320; *Mitchell v. Home Sav. Bank (N. Y.)*, 38 Hun 255.

But in a Missouri case where the rules of a bank provided that: "The passbook must be presented, in order that payment may be entered therein, provided, however, that payments may be made without the production of the passbook, if the depositor shall prove to the satisfaction of the executive committee that his book has been lost, stolen or destroyed, and shall give to the company a written discharge, with satisfactory indemnity against loss, for any payment made without the production of said book," it was held that where there was no question about the identity of a depositor, and the officers of the bank were satisfied that he was the right party, and that

his passbook had been lost or stolen, the bank was not entitled to require him to give bond to protect the bank against payment to the wrong person. *Bayer v. Commonwealth Trust Co. (Mo.)*, 129 S. W. 268.

71. Mitchell v. Home Sav. Bank (N. Y.), 38 Hun 255.

72. Order by depositor to allow his wife to draw deposit.—*Wayne County Sav. Bank v. Airey*, 95 Mich. 520, 55 N. W. 355.

73. Right to recover money deposited in excess of amount bank is entitled to receive.—*Taylor v. Empire State Bank*, 66 Hun 538, 21 N. Y. S. 643, 50 N. Y. St. Rep. 269, construing Laws 1882, c. 409, § 290.

74. Estoppel to deny liability to repay special deposit.—*Abbott v. Wolfborough Sav. Bank*, 68 N. H. 290, 38 Atl. 1050; *Cogswell v. Rockingham, etc., Sav. Bank*, 59 N. H. 43.

75. No estoppel to deny authority to receive bonds for safe-keeping.—*Greeley v. Nashua Sav. Bank*, 63 N. H. 145.

authority from the depositor to collect the deposit, as the bank, by not making this objection at the time of plaintiff's demand, waives it.⁷⁶

§ 306. Actions—§ 306 (1¼) Prerequisites to Action.—The claim of a creditor of a savings bank need not be reduced to a judgment before bringing action against the directors of the bank for a misappropriation of its funds.⁷⁷

§ 306 (1½) Whether Remedy Is at Law or in Equity.—Under a statute making the trustees of a savings bank liable to creditors for any excess of indebtedness, contracted over a certain amount, the remedy is in equity alone, for the benefit of all the creditors.⁷⁸

§ 306 (1½) Whether a Joint Action or Separate Actions Proper.—If a person makes deposits on two separate accounts at a savings bank in trust for two of his children, the claims of the children against the bank after his death are several, and not joint, and can not be united in one action; and the fact that the bank at the trial made no objection to the joint action can not enable the appellate court to enter a judgment which the law does not warrant.⁷⁹ A joint action for the purpose merely of collecting the amount due on subscriptions to capital stock of a savings bank can not be maintained against all the subscribers.⁸⁰

76. Waiver of defense by bank.—*Atlanta, etc., Banking Co. v. Close*, 115 Ga. 939, 42 S. E. 265.

Where a depositor in a savings bank is a nonresident, and places the collection of the account in the hands of an attorney, who demands it of the bank officers presenting the passbook, and the officers inform the attorney that they will not pay the interest claimed, but will look into the question as to the principal, in a suit against the bank it can not set up as a defense that the attorney had not complied with the by-laws by showing written authority to collect. *Atlanta, etc., Banking Co. v. Close*, 115 Ga. 939, 42 S. E. 265.

77. Judgment on claim not essential prerequisite to action against directors for misappropriation.—*Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

78. Remedy of creditors where bank's indebtedness exceeds legal limit.—*Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

The Act of congress (16 Stat. 98), under which certain corporations are organized in the District of Columbia, contains a provision, that, "if the indebtedness of any company organized

under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." Held: 1. That an action at law can not be sustained by one creditor of a savings bank organized thereunder for the liability thus created, or for any part of it, but that the remedy is in equity. 2. That this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts. *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

But in Missouri it has been held that the liability of the directors of a savings bank, who have loaned to one person a sum greater than one-fourth of the bank's capital stock, contrary to Rev. St. 1879, § 916, may be enforced by an action at law, where no accounting is necessary in order to determine the extent of the loss. *Thompson v. Greenley*, 107 Mo. 577, 17 S. W. 962.

79. Claims that can not be united in one action.—*Ellison v. New Bedford, etc., Sav. Bank*, 130 Mass. 48.

80. Herron v. Vance, 17 Ind. 595.

§ 306 (1½) When Cause of Action Accrues.—Where a savings bank refuses payment to a depositor who has failed to comply with the by-laws and rules of the bank, without requesting such compliance, the depositor's cause of action against the bank accrues immediately on such refusal.⁸¹ An action brought against a savings bank, within ninety days after demanding the amount of a deposit, to recover the deposit, is not premature, where the bank refused to pay, not on the ground that it was entitled to ninety days' notice, but on the ground that it had paid the money to another.⁸²

§ 306 (1¾) Statute of Limitations.—Managers of a savings bank are trustees. Therefore if they commit a breach of trust, they can not plead the statute of limitations.⁸³

§ 306 (2) Parties.—As to parties to actions after a bank has been placed in the hands of a receiver, see post, "Parties to Actions," § 309 (18).

§ 306 (2a) To Actions against Bank.—The assignee of a deposit book issued by a savings bank can not maintain an action on it in his own name against the bank.⁸⁴ But one to whom a depositor in a savings bank has given the bank book and an order for payment of the deposit may, after due notice to the bank, death of the depositor, and payment by the bank to the administrator, recover the amount in an action against the bank, brought in the name of the administrator, without his assent.⁸⁵ In some states there are statutes prescribing who may be made a defendant in an action against a savings bank to recover a deposit.⁸⁶

§ 306 (2b) To Actions against Officers of Bank.—By Whom Action May Be Brought.—A creditor of a savings bank may sue the directors

81. When cause of action accrues.—Kenny v. Harlem Sav. Bank, 65 Misc. Rep. 466, 120 N. Y. S. 82, reversing 61 Misc. Rep. 144, 114 N. Y. S. 749.

Where a savings bank depositor has informed the bank that his book has been stolen from him and that he can not produce it, and demands payment, which is refused, without any request for him to comply with the special rules or by-laws authorized by Banking Law (Consol. Laws, c. 2), § 152, forbidding payment to a depositor unless he produces his passbook, but authorizing the trustees to provide by their by-laws for payments where passbooks are lost, the depositor's cause of action against the bank accrues immediately on such refusal. Order, Kenney v. Harlem Sav. Bank, 61 Misc. Rep. 144, 114 N. Y. S. 749, reversed in 65 Misc. Rep. 466, 120 N. Y. S. 82.

82. Abramowitz v. Citizens' Sav. Bank, 17 Misc. Rep. 297, 40 N. Y. S. 385.

83. Managers committing breach of

trust can not plead statute.—Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

84. Assignee of deposit book can not maintain action in his own name.—Howard v. Windham County Sav. Bank, 40 Vt. 597.

85. Donee of deposit may maintain action in name of depositor's administrator.—Foss v. Lowell, etc., Sav. Bank, 111 Mass. 285.

86. Who may be made a defendant.—The Massachusetts statute, St. 1876, c. 203, § 19, only authorizes to be summoned in as a party defendant to an action against a savings bank for money on deposit therewith "any other party than the plaintiff in such action." Under this statute the depositor's administrator, in an action brought in his name, and stated in the declaration to be for the benefit of one claiming the deposit by gift of the intestate, can not be made a defendant. Pierce v. Boston, etc., Sav. Bank, 125 Mass. 593.

thereof for a misappropriation of its funds, although he became a creditor after the misappropriation had been made.⁸⁷ Directors of a savings bank may make themselves liable in an action at law for damages resulting from false representations made or caused to be made by them, and perhaps acts done or caused to be done by them, with intent thereby to deceive and defraud the plaintiff.⁸⁸ In West Virginia it has been held that a creditor of a savings bank can not maintain an action at law against the directors for damages resulting from their negligence in the management and disposition of the moneys and property of the corporation.⁸⁹ But in Virginia the contrary rule prevails.⁹⁰ Under an Indiana statute, the auditor of the state is the only person authorized to maintain an action against the officers and trustees of savings banks for violation of their statutory duties.⁹¹ The assignee of a depositor in a savings bank can maintain an action against the directors of such bank for a misappropriation of funds.⁹²

Joinder of Parties.—The trustees of a savings bank may be sued for exceeding their authority in making an unsafe loan without joining the borrowers as parties defendant, who had no knowledge of the breach of trust on the part of the trustees.⁹³ In an action against trustees of a savings bank, the legal personal representatives of a deceased trustee are properly joined.⁹⁴

§ 306 (3) Interpleader and Substitution of Parties.—A savings

87. Creditor may sue directors for misappropriation of funds.—*Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

This action may be brought by any one creditor, independent of the others, especially where it does not appear that there were other creditors. *Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

88. Creditor may sue directors for damages resulting from false representations or fraud.—*Zinn v. Mendel*, 9 W. Va. 580.

89. Action at law against directors for damages resulting from their negligence.—*Zinn v. Mendel*, 9 W. Va. 580.

90. The president of a savings bank misappropriated its funds and over-drew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely over-drew their accounts, and were loaned large sums by the bank with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for

statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent on the deposits. Held, that though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors. *Lewis, P.*, and *Richardson, J.*, dissenting. *Marshall v. Farmers', etc., Sav. Bank*, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

91. Action for violation of statutory duties—Indiana statute construed.—*Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214, construing Rev. St. 1881, § 2757.

92. Assignee of depositor may maintain action for misappropriation of funds.—*Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

93. Trustees may be sued for making unsafe loan without joining borrowers.—*Paine v. Barnum*, 59 How. Prac. 303.

94. Personal representatives of deceased trustee properly joined.—*Paine v. Irwin* (N. Y.), 59 How. Prac. 316.

bank can not interplead an adverse claimant of a deposit who claims by title superior to that of the depositor, where such adverse claimant does not proceed by process of law to enforce his rights.⁹⁵ Before an interpleader will be permitted under the New York statute,⁹⁶ in an action against a bank to recover a deposit, substituting other claimants of the fund as defendants, the affidavits and papers on which the motion is founded must set out facts showing that there is some foundation for the claim asserted to the fund, or some plausibility in the claim, or such a state of facts as justifies a reasonable doubt in the mind of the moving party as to its validity.⁹⁷ Under a New York statute,⁹⁸ if an action is brought against a savings bank to recover moneys on deposit, and any persons not parties to the action claim the same fund, the court may, on petition of the bank, make such claimants parties defendant.⁹⁹ Where, in an action against a savings bank to recover

95. Interpleader of one who claims by title superior to depositor's.—*German Sav. Bank v. Friend*, 20 N. Y. S. 434, 48 N. Y. St. Rep. 400, 61 N. Y. Super. Ct. 400.

96. Code of Civ. Proc., § 820.

97. When interpleader permitted under New York statute.—*Mars v. Albany Sav. Bank*, 64 Hun 424, 19 N. Y. S. 791, 46 N. Y. St. Rep. 464, affirmed in 69 Hun 398, 23 N. Y. S. 658, 53 N. Y. St. Rep. 144.

In an action against a bank by an administratrix to recover a deposit made by her intestate, the bank filed an affidavit that the deposit was claimed by certain persons as a gift, and asked that they be substituted as defendants. The affidavit stated that such claimants presented to defendant copies of orders purporting to be signed by intestate, directing the deposit to be paid them as per accompanying passbook, and that the orders, together with the passbook, were delivered to a certain person, with directions to deliver them to claimants on the death of intestate. The affidavit further stated that affiant was informed by claimants' attorney that the orders were delivered to claimants, as directed, but that for some unknown reason the passbook came into the possession of intestate before his death, and thence into the possession of plaintiff. Held, that in the absence of the original orders, or any proof by affidavit of claimants or the person to whom the orders and passbook were delivered, there was nothing authorizing the presumption of gift, and an order for substitution of parties was properly denied. *Mars v. Albany Sav. Bank*, 69 Hun 398, 23 N. Y. S. 658, 53 N. Y. St. Rep. 144, affirming 64 Hun 424, 19 N. Y. S. 791, 46 N. Y. St. Rep. 464.

98. Banking Law, § 115 (Laws 1882, ch. 409, § 259, and Laws 1892, ch. 689).

99. Substitution of parties defendant under New York statute.—*Mahro v. Greenwich Sav. Bank*, 16 Misc. Rep. 537, 40 N. Y. S. 29, 74 N. Y. St. Rep. 639, reversing 16 Misc. Rep. 275, 38 N. Y. S. 126; *McKeown v. Bank*, 26 Misc. Rep. 824, 56 N. Y. S. 1080, modifying 25 Misc. Rep. 797, 54 N. Y. S. 1106.

An application under this statute is not an application for an interpleader. *Mahro v. Greenwich Sav. Bank*, 16 Misc. Rep. 537, 40 N. Y. S. 29, 74 N. Y. St. Rep. 639, reversing 16 Misc. Rep. 275, 38 N. Y. S. 126.

It is only essential that such application make it appear that the person sought to be made defendant claims the fund in suit, and it need not state facts showing the nature of his claim. *Mahro v. Greenwich Sav. Bank*, 16 Misc. Rep. 537, 40 N. Y. S. 29, 74 N. Y. St. Rep. 639, reversing 16 Misc. Rep. 275, 38 N. Y. S. 126.

Where the fund in controversy is deposited in the name of plaintiff and another, defendant is entitled, under the statute, to have the latter made a party. Order, 25 Misc. Rep. 797, 54 N. Y. S. 1106, modified. *McKeown v. Bank*, 26 Misc. Rep. 824, 56 N. Y. S. 1080.

Where a depositor's administrator claimed a deposit standing in the name of his intestate before action brought by plaintiff to recover the deposit under an alleged gift from the intestate, the bank is entitled under the statute to have the administrator joined as a party defendant. *Quinn v. Bank*, 86 N. Y. S. 285; *McGuire v. Auburn Sav. Bank*, 78 App. Div. 22, 79 N. Y. S. 91.

And it is not essential in such case that the bank should show that the

a deposit by an alleged donee thereof, an order is made substituting the depositor's administrator as a defendant, it is proper for the court, in its discretion, to direct the passbook to be surrendered to the bank.¹

§ 306 (4) Pleading—§ 306 (4a) In Actions against Bank—§ 306 (4aa) Complaint.—A complaint in an action to recover money from a savings bank, alleging that certain money, the property of plaintiff, was deposited with defendant by a third party, and that defendant refuses to pay over the money on demand, is defective in failing to allege that defendant knew that the money was plaintiff's, or that it was left for his benefit or in trust for him.² In a proceeding by quo warranto against a savings bank prosecuted for usury, an allegation that the bank purchased negotiable bills at amounts exceeding the current rates of exchange, with a view to evading the charter restrictions as to interest, is insufficient to charge usury. Where the charter merely restricted the interest to be charged on notes, and did not affect its purchase of bills of exchange at whatever rates might be agreed upon between itself and those dealing with it.³

§ 306 (4ab) Answer.—Where, in an action to recover a savings bank deposit, the bank answers, denying possession of the amount claimed, to escape a default, before moving to have an adverse claimant of the deposit made a party defendant, the answer does not affect the bank's right to such relief.⁴ Where, in an action by a creditor against a bank, the defense of ultra vires in the contract incurring the indebtedness is pleaded by defendant to plaintiff's complaint only, and the answer to the pleading of an intervener, claiming as an attaching creditor of plaintiff's assignor, merely denies the indebtedness to the assignee, the finding of ultra vires required by the evidence should be against the intervener, as well as the plaintiff; it appearing

administrator's claim is well founded. *McGuire v. Auburn Sav. Bank*, 78 App. Div. 22, 79 N. Y. S. 91.

The statute has no application where persons claiming the fund in suit have only a future interest, and not a present right to the fund. *Gifford v. Oneida Sav. Bank*, 99 App. Div. 25, 90 N. Y. S. 693.

Where an administrator sued for savings deposits made by his intestate in defendant's bank in her name "in trust for T. H.," plaintiff having alleged that the name "T. H." was fictitious, that the deposits were really made by decedent for her own benefit, and that the defendant knew this to be true, plaintiff's case depends on her proving such allegations, and defendant is not, therefore, entitled under the statute, to an order making T. H. and other parties defendants. Order, 61 N. Y. S. 971, 29 Misc. Rep. 492, affirmed. *Washington v. Seaman's Bank*, 47 App. Div. 625, 48 App. Div. 632, 62 N. Y. S. 1150.

Though the city court of New York can not, after entry of an order of interpleader under Code Civ. Proc., § 820, proceed with the action, it can grant a similar motion, and proceed, when the order is granted under Banking Law, Laws 1892, p. 1896, c. 689, § 115, and when the action is to recover money on deposit; the statute expressly conferring such power. *Gottschall v. German Sav. Bank*, 45 Misc. Rep. 27, 90 N. Y. S. 896.

1. **Court's discretion to direct passbook to be surrendered to bank.**—*Quinn v. Bank*, 86 N. Y. S. 285.

2. **Complaint in action to recover money deposited by a third party.**—*Crosby v. Bowery Sav. Bank*, 67 How. Prac. 329, 50 N. Y. Super. Ct. 453.

3. **Allegation insufficient to charge usury.**—*State v. Boatmen's Sav. Inst.*, 48 Mo. 189.

4. **Answer not affecting bank's right to have adverse claimant made a party defendant.**—*Quinn v. Bank*, 86 N. Y. S. 285.

that such intervener was not harmed by the omission to again plead *ultra vires* and that the court treated it as properly pleaded against him.⁵

§ 306 (4b) In Actions against Officers or Stockholders of Bank—§ 306 (4ba) Complaint or Bill.—Where the directors of a savings bank are sued for damages resulting from false representations made or caused to be made, or acts done or caused to be done by them, and relied on by the plaintiff, the false representations or acts, and the intent thereby to deceive and defraud the plaintiff, must be averred in positive terms.⁶ Where a bill filed by a receiver charges that defendants, as managers of a savings bank, have improperly loaned corporate funds without adequate security, and that the receiver was compelled to accept in settlement securities which then were, and ever since have been, worth \$400,000 less than the loan, a loss is sufficiently averred, although the securities have not been turned into cash.⁷ Where a statute required persons seeking to organize a bank to file with the secretary of state a certificate specifying, among other things, the names, residence, and amount of shares of each stockholder, a suit to enforce the liability of stockholders on their subscriptions, and settle the affairs of a savings bank which has become insolvent, should be based on such certificate, which should be filed with the complaint.⁸

§ 306 (4bb) Demurrer.—Where a bill in equity avers a long and systematic violation of a savings bank charter by the president and committee men, the managers can not demur on the ground that the misconduct was not traced to them.⁹

§ 306 (4½) Demand for an Accounting.—An action by a creditor of a savings bank against the directors thereof for a misappropriation of its funds is not primarily an action to enforce an accounting, and a specific demand for an accounting need not be made.¹⁰

§ 306 (5) Evidence—§ 306 (5a) Presumptions and Burden of Proof.—One who seeks to charge as a partner a person who has purchased stock in an organized bank doing business as a savings bank has the burden of proving that the bank was a partnership.¹¹ In an action against a sav-

5. Effect of failure to again plead *ultra vires* after intervention.—*Laidlaw v. Pacific Bank*, 137 Cal. 392, 70 Pac. 277.

6. Intent to deceive and defraud must be averred in positive terms.—*Zinn v. Mendel*, 9 W. Va. 580.

7. Loss resulting from improper loan sufficiently averred.—*Dodd v. Wilkinson*, 41 N. J. Eq. 566, 7 Atl. 337.

8. Certificate required to be filed with complaint.—*Herron v. Vance*, 17 Ind. 595, construing 1 Rev. St. 1852, p. 159.

9. Ground for demurrer by managers held insufficient.—*Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep.

775, reversing *Williams v. Halliard*, 38 N. J. Eq. 373.

Prima facie, in such case, the managers must be presumed to have known of the conduct of the president and committee men, and they are liable for injury from want of ordinary care. *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, reversing *Williams v. Halliard*, 38 N. J. Eq. 373.

10. In action against directors for misappropriation demand for accounting not required.—*Rice v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

11. Burden of proving that bank was a partnership.—*In re Gibbs*, 157 Pa.

ings bank to recover a deposit, plaintiff need not show that by the rules of the bank the depositor was entitled to the money without prior notice, as there is no legal presumption that the bank had a rule entitling it to prior notice.¹² A bank, in an action by a depositor to recover the balance of a savings account, has the burden of proving an alleged payment of or withdrawal by the depositor.¹³ In an action against savings bank to recover money deposited by plaintiff, which the bank refused to pay on the ground that it had been paid to a third person presenting the passbook, it is not incumbent on plaintiff to show negligence on the part of the bank.¹⁴

§ 306 (5b) Admissibility.—Where one deposits money in a savings bank to the credit of another, retaining the deposit book herself, and having minuted upon it that the money could be paid to her, evidence aliunde is admissible, upon her death, to show her intent in making the deposit.¹⁵ Where one deposits money in his own name as trustee for another, evidence of his acts and declarations is admissible upon his death, to show whether he intended to create a trust.¹⁶ In an action against a savings bank on an account annexed, to recover the amount of a deposit, the deposit book is admissible to show the amount of plaintiff's money received by the bank,

59, 27 Atl. 383, 22 L. R. A. 276; Appeal of Pease, 157 Pa. 75, 27 Atl. 386.

12. No presumption of rule entitling bank to prior notice of withdrawal of deposit.—*Weld v. Eliot, etc.*, Sav. Bank, 158 Mass. 339, 33 N. E. 519.

13. Burden of proving payment of a deposit.—*Robinson & Sons v. Upton*, 12 O. C. C., N. S., 314, 21-31 O. C. D. 330.

14. Burden not on plaintiff to show bank's negligence in making payment.—*Abramowitz v. Citizens' Sav. Bank*, 17 Misc. Rep. 297, 40 N. Y. S. 385. But see, *Israel v. Bowery Sav. Bank* (N. Y.), 9 Daly 507.

15. Evidence admissible to show intent in making deposit to another's credit.—*Northrop v. Hale*, 72 Me. 275.

16. Evidence admissible to show whether depositor intended to create a trust.—*Gerrish v. New Bedford Inst.*, 128 Mass. 159, 35 Am. Rep. 365.

In an action by the executor of A. against a savings bank to recover money deposited by A., it appeared that, after depositing in his own name all allowed by the rules, he made other deposits as trustee, one for his only son by name, and the others for his two grandchildren by name; that for these deposits he took separate bank books, which, after his death, were found among his effects, having never been delivered, and that A. during his lifetime collected, receipted for, and used all dividends declared upon these deposits. A by-law of the bank pro-

vided that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." The son and grandchildren, who appeared as claimants, under St. 1876, c. 203, § 19, offered to prove, in addition to the facts above stated, that A. had said to each of them, at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his lifetime; and that, after he was gone, they were to have the money." Held, that the evidence offered was admissible. *Gerrish v. New Bedford Inst.*, 128 Mass. 159, 35 Am. Rep. 365.

A by-law of a savings bank provided that any depositor might designate at the time of the deposit for whose benefit the same was made, and should be bound by such condition. A father deposited a sum in his own name—David Knowles—and a like sum in the name "David Knowles, trustee for Eliza Knowles"—his daughter. In an action brought by her against the bank after his death, for the latter sum, held, notwithstanding his assent to the by-laws, that parol evidence was admissible to show that both deposits were his money, and that one was made in her name because the amount of both exceeded the sum which the law allowed the bank to hold for a single depositor. *Brabrook v. Boston, etc.*, Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222.

although such book contains printed conditions of deposit and payment.¹⁷ In an action against a bank by a husband for money paid to his wife from his account, evidence that his wife frequently made deposits on his account, presenting his bank book and drawing the money from the bank on account of her husband, and that the bank had no notice of any change in the relationship between the husband and wife, is admissible to show whether or not the wife had actual or implied authority from the husband to draw on his account.¹⁸ In an action against a savings bank to recover a deposit, evidence that the depositor, whose bank book had been stolen, and the balance therein paid to the thief, was at the time of his death, about two and a half months after such money was drawn, possessed of but a small amount of money, was properly admitted, as tending to negative defendant's position that such depositor, or some one with whom he was in collusion to defraud defendant, drew such money.¹⁹

§ 306 (5c) Weight and Sufficiency.—Cases relating to the weight of the evidence and its sufficiency to prove particular facts, in actions by or against savings banks, or against the officers or stockholders of such banks, or between persons claiming money deposited in such banks, will be found in the appended note.²⁰

17. Deposit book admissible to show amount received by bank.—*Brown v. Abington Sav. Bank*, 119 Mass. 69.

18. Evidence admissible to show whether wife had authority to draw on husband's account.—*Moline State Sav. Bank v. Liggett*, 106 Ill. App. 223.

19. Evidence admissible to negative defense of fraud.—*Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700.

20. Evidence not proving, prima facie, that bank was a partnership.—One who seeks to charge as a partner a person who has purchased stock in an organized bank doing business as a savings bank has the burden of proving that the bank was a partnership, and not even a prima facie case is made by evidence that the bank was organized under the name of the Home Savings Bank, with a president, cashier, and board of directors; that its certificates of stock recited organization under the laws of the state, and the division of its capital into shares of \$100 each; and that its profits were distributed in the shape of dividends on stock. *In re Gibbs*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276; *Appeal of Pease*, 157 Pa. 75, 27 Atl. 386.

Evidence establishing husband's ownership of deposits.—In a contest involving the ownership of deposits in a savings bank, as between the estates of deceased husband and wife, the books showed deposits in the name of

the wife, and there was evidence of the following circumstances: The husband's ability and the wife's inability to earn and accumulate; the depositing and withdrawing of sums in and from the accounts by the husband; the transfer of sums between the accounts in question and other accounts of the husband; that the husband in fact opened the account; that he had prior accounts which had run up to \$2,000, the legal limit for a single depositor; that after the wife's death the husband continued the account as his own; that no administration was taken out on the wife's estate for four years; that before her death she had given her husband an order for the whole sum; that she had never had any other account; that the wife had never personally deposited or withdrawn a single sum; that she was unknown to the officers of the bank; that the passbook was usually in the husband's possession, or else in their joint possession. Held, that the evidence established the ownership of the husband. *Kennebec Sav. Bank v. Fogg*, 83 Me. 374, 22 Atl. 251.

Evidence warranting jury in finding plaintiff entitled to deposits.—In an action against a savings bank by the administrator of A., there was evidence that on a certain day there was standing to the credit of A., on the books of defendant, a certain sum on two accounts; that on the same day he drew

§ 306 (6) Trial—§ 306 (6a) Province of Court and Jury.—

The following questions have been held to be questions of fact for the de-

an equal amount from each account, and afterwards, on the same day, opened three new accounts with defendant in the name of "A., trustee," and deposited a certain sum on each; that during the lifetime of A. the five books of deposit, received by him of defendant, were lost or stolen from his possession; that A. notified defendant, after the loss of the books, that they had not been transferred, and were his property; that defendant paid plaintiff, as administrator, the amounts due on the two old books and on one of the new ones on his filing a bond to indemnify the bank against the production of the books, but declined to pay him the amounts due on the remaining two books, although he tendered to defendant a bond to indemnify it against the production of the missing books, or against the claims of any cestui que trust; and that neither of the five books has ever been produced, and that no demand has been made on either party by any person claiming to be a cestui que trust of the new accounts remaining unpaid. Held, that the evidence would warrant the jury in finding for plaintiff. *Powers v. Provident Inst.*, 124 Mass. 377.

Evidence not conclusive of ownership of a deposit.—The entries upon the books of a savings bank, and upon the passbooks issued by such bank to a depositor, are not conclusive evidence of the ownership of a deposit in the bank. *Kennebec Sav. Bank v. Fogg*, 83 Me. 374, 22 Atl. 251.

Evidence as to control of deposit.—Evidence that a passbook showing a deposit of a savings fund in the name of both father and daughter was kept by the daughter in the common receptacle of the household in her mother's room where the daughter could and did get it whenever she wished, and that the family were in moderate circumstances and lived together amicably, does not warrant a holding that the book was not in the daughter's possession sufficiently to indicate a control of the fund as claimed by her. *Carlin v. Carlin* (N. J.), 64 Atl. 1018.

Evidence sustaining finding that bank book was destroyed.—In an action by an administrator to recover of a bank the balance due on a deposit made in 1861 by the intestate, who died in 1868, there was evidence of a fire

in 1867 in the house occupied by the intestate, in which many of his papers were destroyed. The treasurer of the bank testified that he had been connected with the bank for twenty-five years, and that no one had demanded payment of the account, or had presented the deposit book. There was also evidence that some time between April, 1863, and October, 1875, notice was given, though it did not appear by whom, that the book was lost. Held to sustain a finding that the book was destroyed by the fire in 1867. *Hudson v. Roxbury Inst.*, 57 N. E. 1021, 176 Mass. 522.

Evidence showing want of authority and fraud in drawing money.—In an action by a bank to recover money drawn from a third person's deposit by defendant's intestate, the depositor denied intestate's authority. The cashier testified that he did not remember the representations made by intestate; that intestate had the passbook, and receipted for the money. He and another witness testified to different conversations in which the depositor said that intestate could use his money, but these conversations were denied by the depositor. The bank's answer in a suit against it by the depositor averred intestate's authority to draw the money. Depositor could not read English, but could read certain numerals. He deposited money after the withdrawals by intestate, but denied having seen the charges against him on the passbook. Held sufficient to show want of authority and fraud on intestate's part in drawing the money. *City Sav. Bank v. Enos*, 135 Cal. 167, 67 Pac. 52.

A finding that a savings bank was negligent in paying plaintiff's deposit to a person who presented the passbook and answered correctly as to all information given by plaintiff when he opened the account is supported by evidence that the paying teller knew plaintiff by sight. *Geitelsohn v. Citizens' Sav. Bank*, 19 Misc. Rep. 422, 44 N. Y. S. 89, affirmed in 20 Misc. Rep. 84, 45 N. Y. S. 90.

On the issue as to whether a savings bank was negligent in paying a deposit to a wrong person, evidence held to warrant the jury in finding negligence on the part of the bank, making it liable to the depositor for the money paid. *Chase v. Waterbury*

termination of the jury: Whether a particular bank is under the evidence a savings institution, which pays interest on its deposits which are not sub-

Sav. Bank, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

Evidence held to show bank was not negligent in making payment.—In an action against a savings bank to recover deposits, in which defendant alleged that it had paid the deposits after the depositor's death to her mother and sister, who had possession of the passbook and signed orders for the money, evidence considered, and held to show that the bank was not negligent in failing to observe the difference between the signature of the depositor and that of the person drawing the money. *Kelley v. Buffalo Sav. Bank*, 88 App. Div. 374, 84 N. Y. S. 642, 14 N. Y. Ann. Cas. 81, reversed in 180 N. Y. 171, 72 N. E. 995, 69 L. R. A. 317, 105 Am. St. Rep. 720.

Evidence of negligence insufficient to warrant submission of question to jury.—Where a savings bank, whose rules provide that although the bank will endeavor to prevent fraud upon its depositors, yet that the possession of its passbook by a depositor shall be sufficient authority to warrant any payment, and that all payments to persons producing the book shall be valid, has a custom requiring a signature of each depositor at the opening of an account in a book kept by the bank for that purpose, in an action against the bank by a depositor who had so signed, and whose book was stolen, and presented to the bank by one who had signed such depositor's name to a receipt for the amount of the deposits, and received the same, in which the bank's assistant teller who paid the money testifies that he compared the signature to the receipt with that of plaintiff upon the books, and was satisfied of the genuineness of the former, but the evidence adduced by plaintiff tends to show that the signatures were unlike, it is proper to refuse to submit to the jury the question whether the failure to discover the discrepancy was not negligence. *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

Evidence insufficient to prove a trustee liable for mismanagement.—In an action against trustees of a savings bank for damages caused by their misconduct in the management of the bank, as to one defendant there was no evidence other than the minutes of his attendance at the meeting which authorized the purchase of certain realty, which purchase was alleged to

be reckless and unreasonable extravagance. He denied such attendance, and asserted his ignorance of the transaction until it was closed. Held, that he was entitled to a dismissal of the complaint. *Hun v. Cary* (N. Y.), 59 How. Prac. 426.

Action for deposit—Verdict for defendant properly directed.—In an action against a savings bank by the administratrix of a deceased depositor to recover an alleged unpaid balance, it was established that the deposits made by the decedent were subject to a by-law requiring, in case of withdrawals, production of the bank book, and that during her lifetime practically the entire deposit had been so withdrawn. The bank book was not produced or accounted for at the trial. Held, that a verdict for defendant was properly directed. *Hales v. Seamen's Bank*, 28 App. Div. 407, 51 N. Y. S. 140.

Evidence showing that order authorizing transfer of passbook was presented and acted upon.—In an action to recover possession of a savings bank passbook issued to plaintiff's testatrix, the evidence held to show that an order executed by testatrix, authorizing the bank to transfer her passbook and her interest therein to defendant, was presented to the bank and acted upon prior to testatrix's death. Order, 114 App. Div. 626, 99 N. Y. S. 989, affirmed. *Augsbury v. Shurtliff*, 190 N. Y. 507, 83 N. E. 1122.

Evidence showing sufficient consideration for assignment of bank account.—Evidence held sufficient to warrant a finding that a decedent's assignment of a savings bank account was supported by a sufficient consideration. *Stacks v. Buten*, 141 Wis. 235, 124 N. W. 403.

Evidence not justifying conclusion that beneficiary of deposit received benefit of it.—Where money was deposited in a savings bank for an infant, and the bank negligently paid the same to the child's father, in a suit by the beneficiary to recover of the bank testimony of the father that the money was expended in carrying a question pending between members of his family to such a head as resulted in the child's remaining at a certain college a year longer than she otherwise would have done did not justify a conclusion that she received the benefit of the money in such sense as to defeat her recovery. *Ficken v. Emi-*

ject to check;²¹ whether or not the purchase of land by the trustees of a savings bank, was, considering the financial condition of the bank, a reasonable exercise of the discretion vested in them;²² and whether, where one deposits money in a savings bank in his own name as "trustee," without naming any cestui que trust, the money so deposited belongs to the depositor absolutely, or is held by him in trust.²³ Where husband and wife, having individual accounts at a savings bank, execute an order on the bank

grants', etc., Sav. Bank, 33 Misc. Rep. 92, 67 N. Y. S. 143.

Evidence warranting finding that right to notice of withdrawal had been waived.—In an action for money had and received against a savings bank, whose by-laws provided that a three months' notice in writing should be given of a depositor's intention to withdraw a sum of the amount sued for, the answer alleged that the bank had in its possession a certain sum standing in the name of the plaintiff; that the bank was summoned as trustee, and the funds were attached, in an action against the plaintiff's husband, as funds belonging to him, but standing in her name; that the bank was charged as trustee in that action, and judgment was entered against it, upon which execution issued; and that, after satisfying the execution and deducting the trustee's costs and sums withdrawn, the bank had in its hands a certain sum, which it was ready to pay to the person to whom the same belonged. There was evidence tending to show that the plaintiff, no notice in writing having been given by her, went to the bank, and asked for the funds standing in her name, and that the treasurer replied that she had no funds in the bank; and the treasurer testified that he declined to pay the money to the plaintiff because the funds claimed were held by trustee process, and that, if they had not been so held, he would have paid her. The plaintiff testified, without contradiction, that the money was her own; and her husband, who was summoned in as claimant, disclaimed said funds. Held, that the evidence warranted a finding that the right to notice had been waived. *Townsend v. Webster*, etc., Sav. Bank, 143 Mass. 147, 9 N. E. 521.

21. Whether bank is a savings institution a question for jury.—*Dottenheim v. Union Sav. Bank, etc., Co.*, 114 Ga. 788, 40 S. E. 825.

22. Question whether trustees exceeded their discretion is for jury.—*French v. Redman* (N. Y.), 13 Hun 502. In this case the bank was incorporated in 1867, and during the years

1867, 1868, and 1869 the expenditures exceeded the receipts. In 1870 and 1871 the receipts were in excess of the expenditures, and in 1872 and 1873 the expenditures again exceeded the receipts. In 1873 the trustees purchased four lots, three of which were sold, and on the fourth a banking house was erected. An action was brought by a receiver against the trustees to recover damages sustained by the bank by the purchase of the lots.

23. Question whether deposit belonged to depositor absolutely or in trust property submitted to jury.—In an action against a savings bank by the administrator of A., there was evidence that, on a certain day, there was standing to the credit of A., on the books of the defendant, a certain sum on two accounts; that on the same day he drew an equal amount from each account, and afterwards, on the same day, opened three new accounts with the defendant in the name of "A., Trustee," and deposited a certain sum on each; that during the lifetime of A. the five books of deposit, received by him of the defendant, were lost or stolen from his possession; that A. notified the defendant, after the loss of the books, that they had not been transferred, and were his property; that the defendant paid the plaintiff, as administrator, the amounts due on the two old books and on one of the new ones, on his filing a bond to indemnify the bank against the production of the books, but declined to pay him the amounts due on the remaining two books, although he tendered to the defendant a bond to indemnify it against the production of the missing books, or against the claim of any cestui que trust; and that neither of the five books has ever been produced, and that no demand has been made on either party by any person claiming to be a cestui que trust of the new accounts remaining unpaid. Held, that the case was properly submitted to the jury on the issue whether the money deposited by A. on the new accounts belonged to him absolutely, or was held by him in trust. *Powers v. Provident Inst.*, 124 Mass. 377.

to merge the same, in an action on the death of the wife to recover possession of the bank book it is reversible error to nonsuit the plaintiff without submitting to the jury the question as to whether such order was delivered by the husband to the bank during the life of the wife.²⁴ Whether, after a savings bank has been notified, by one claiming the right of control over money deposited in the bank, not to pay the money to a person who is in possession of the deposit book, the assent of the person giving such notice to the payment of the money to the person having possession of the book can be inferred from facts in evidence, is a question of fact for the jury, and not one of law for determination by the court.²⁵ Where a savings bank pays out a deposit to one other than the depositor, who, without authority, presents the deposit book, the question whether the bank exercised reasonable care in making the payment, if there is evidence that it did not exercise such care, is for the jury, notwithstanding a by-law of such bank provides that all payments made by the bank on presentation of such book shall be binding on the depositor.²⁶ But it has been held that

24. Question of time of delivery of order to merge accounts is for jury.—*Augsbury v. Shurtliff*, 180 N. Y. 138, 72 N. E. 927, reversing 90 App. Div. 613, 86 N. Y. S. 1128.

25. Question whether assent to payment of deposit can be inferred is for jury.—Money was deposited in the savings department of a bank, one of whose rules, as printed in the deposit book, was that deposits were payable to the person producing the book, unless the book had been lost, and notice given to the bank before payment. After the bank had had oral notice not to pay the deposit to a certain person who might present the book, the book was presented by such person for payment, and the bank sent for the person who had given the notice, who appeared, and a conversation took place in the bank between the two, relative to the deposit, after which the bank paid the money. Held, in an action against the bank for paying the money contrary to the notice, that it was for the jury to determine whether from said conversation and the omission to make further objection, the authority of the bank to make the payment could be inferred. *Eagle, etc., Mfg. Co. v. Belcher*, 89 Ga. 218, 15 S. E. 482.

26. Question of bank's negligence in making payment is for jury.—*Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

Whether a savings bank is liable for money deposited, which has been paid to another than the depositor on presentation of his deposit book, which

was stolen, there being evidence of negligence on the part of defendant, in not requiring such person to identify himself, and in not comparing his signature with that of such depositor on the bank's books, is a question for the jury. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549, 39 Atl. 336, 68 Am. St. Rep. 700.

In an action against a savings bank by a depositor to recover money charged to have been negligently paid out by the bank on a forged check, where it appeared that there were some dissimilarities between plaintiff's genuine signature on the bank's signature book and the forged signature, the court properly left it to the jury to decide whether the dissimilarities were such as would lead a person of reasonable prudence to accept the check as genuine, and whether the clerk who cashed it could, by ordinary observation, have appreciated the differences. *Frickle v. German Sav. Bank*, 56 N. Y. Super. Ct. 468, 4 N. Y. S. 627, 23 N. Y. St. Rep. 121.

Plaintiff deposited moneys in defendant savings bank, and, being unable to write, signed the bank's signature book with his mark. Later he learned to write, and then recorded his signature with the bank, and thereafter drew three drafts on the bank, which were paid. Subsequently his bank book was stolen from him, and the thief presented it to the bank, and drew eleven drafts on the deposit, signing plaintiff's name. The forged signatures did not resemble the genuine signatures to the three drafts drawn by plaintiff, and the thief was asked

where the officer of the bank who made the payment testifies that he applied the usual tests for identification, according to the custom or rules of the

the test questions concerning plaintiff's age, occupation, and family, and answered them correctly. Plaintiff visited the bank and demanded his money, but was told that it had been paid to the forger, and would not again be paid. Held, that a verdict should not have been directed for plaintiff, but that the case should have gone to the jury on the question whether defendant used due care in the payment of the forged drafts. *Kenny v. Harlem Sav. Bank*, 65 Misc. Rep. 466, 120 N. Y. S. 82.

Where defendant savings bank paid money to S., who presented plaintiff's passbook and forged his name, testimony of the bank's officer, whose duty it was to examine the signatures, that after making comparison he could readily distinguish the genuine signatures from the forgeries; that he did not ask S. any of the questions as to his birthplace, age, etc., which facts are always set opposite a depositor's name for future identification; that the signature was such a good imitation that he did not think he could be mistaken; that he was frequently so busy that he did not have time to ask the questions; and that, on account of the rush of business, if a signature presented "is a tolerably good signature, we have it paid without any questions"—presented a question of defendant's negligence for the jury. *Saling v. German Sav. Bank*, 7 N. Y. S. 642, 15 Daly 386, 27 N. Y. St. Rep. 975.

In replevin against a bank for a passbook evidencing plaintiff's deposit, where one of the regulations contained in such passbook required the depositor to give thirty day's notice of the withdrawal of his deposit, it is a question for the jury whether the bank, in the absence of such notice, was guilty of negligence in paying the amount of plaintiff's deposit to one who had stolen the passbook, and presented it at the bank, personating plaintiff, and signing his name to the receipt; the bank having received no notice from plaintiff of the theft. *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096.

A New York Statute, Laws 1875, c. 371, § 32, as amended by Laws 1878, c. 347, in respect to savings banks, provides that the deposits shall be paid to a depositor or his legal representative, after demand and previous notice, under regulations prescribed by

the board of trustees, which are to be conspicuously posted in the place of business, and printed in the passbook furnished by the bank, and which shall be evidence between it and depositors of the terms on which deposits are made; but that no payments will be made unless the passbook be produced, and the proper entry made therein at the time of the transaction. Defendant adopted a by-law providing that "the treasurer will endeavor to prevent frauds, but all payments made to persons producing the passbook shall be deemed valid payments, and discharge the bank from any further liability." Held, that the question whether or not, under such agreement, the bank was negligent in making advances on the passbook of plaintiff to one presenting it and who was believed by the paying teller to be the plaintiff, whom the teller did not know, was for the jury. *Fox v. Onondaga County Sav. Bank*, 53 Hun 638, 7 N. Y. S. 17, 25 N. Y. St. Rep. 672, 3 Silvernail 397.

Payments made after the death of the depositor.—Where R. presented decedent's passbook to defendant bank, demanding the deposit, and saying that it had been given to her by decedent, and, after she had produced affidavits proving decedent's death and the alleged gift, the bank paid her the money, whether the bank acted with due diligence in ascertaining if she was entitled thereto was for the jury. *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218, 62 N. Y. S. 961.

The rules of defendant, a savings bank, provided (1) that all payments of deposit made to any person producing the proper passbook should be valid, and (2) that on the death of any depositor his deposit should be paid to his legal representative. On the death of a depositor, an alleged donee causa mortis presented his passbook and demanded payment, which was refused; whereupon action was brought and judgment recovered against the bank by the donee, after which the bank paid the deposit to the donee, and recovered back the passbook. The donee's attorney prepared the complaint, and defendant's answer and the referee's decision in the cause, and paid all expenses therein, without cost to defendant. Ifeld, in an action by the administrator of the alleged donor to recover the deposit, that the question of defendant's negligence in mak-

bank, and his testimony is not contradicted, nor his credibility impeached, it is error to submit to the jury the question whether reasonable care was used by the bank.²⁷

§ 306 (6b) Instructions to Jury.—Where a deposit book has been destroyed by fire, the depositor's administrator is thereby excused from producing it,²⁸ and hence requests for instructions based on the necessity of presenting the book in order to obtain payment are properly refused.²⁹

§ 306 (6½) Costs.—A savings bank unjustifiably refuses to pay a deposit, so that costs are properly chargeable against it, if, although the name of the depositor was an assumed one, his identity is shown by possession of the passbook and an affidavit of the fact.³⁰

§ 306 (7) Appeal and Error.—Where there is a finding in an action against a savings bank by a creditor that the debt is for money expended by the creditor for the use and benefit of the bank and at its request, it will be presumed on appeal that the money was expended for purposes for which the bank could incur a liability.³¹ Where in an action against a savings bank for money deposited by plaintiff in the name of another, there is a judgment for defendant, the affirmance of which might embarrass the plaintiff in the enforcement of an equitable right he may have to the deposit, the appellate court should of its own motion reverse the judgment pro forma, and remand the case, that the person in whose name the money is deposited may be cited in, where there is a statute under which such person may be made a party defendant.³²

ing payment of the deposit under these circumstances should have been submitted to the jury. *Farmer v. Manhattan Sav. Inst.*, 60 Hun 462, 15 N. Y. S. 235.

27. When it is error to submit question of bank's negligence to jury.—In an action against a savings bank to recover the amount of a deposit paid to a person who stole the depositor's passbook, the teller testified that he applied the usual tests for identification, according to the custom of the bank, and his testimony was not contradicted, nor was his credibility impeached. Held, that it was error to submit to the jury the question whether reasonable care was used by the bank. *Geitelsohn v. Citizens' Sav. Bank*, 17 Misc. Rep. 574, 40 N. Y. S. 662, 75 N. Y. St. Rep. 64.

Where, in an action against a savings bank to recover a balance alleged to be due a depositor, it appeared that payment was made by the bank on a forged draft, but the officer making the payment testified that the difference between the genuine and the forged signatures was slight, and all means

prescribed by the rules of the bank were exhausted to obtain a sufficient identification at the time payment was made, and such testimony was uncontradicted, it was error to submit the case to the jury. *Ferguson v. Harlem Sav. Bank*, 43 Misc. Rep. 10, 86 N. Y. S. 825.

28. See ante, "Repayment of Deposits," § 305.

29. When requested instructions based on necessity of presenting book properly refused.—*Hudson v. Roxbury Inst.*, 176 Mass. 522, 57 N. E. 1021.

30. When costs are chargeable against bank.—*Davenport v. Savings Bank (N. Y.)*, 36 Hun 303.

31. Presumption on appeal.—*Laidlaw v. Pacific Bank (Cal.)*, 67 Pac. 897.

32. When judgment will be reversed and case remanded that third person may be cited in.—*Kavanagh v. Vermont Sav. Bank*, 68 Vt. 494, 35 Atl. 461. In this case the bank defended on the ground that its contract was with the person in whose name the money was deposited, who, it appeared, had refused to sign a transfer of the account to plaintiff, and there

§ 306 (7½). Custody of Deposits Pending Suit.—Provision is sometimes made by statute for the custody of the fund in controversy in a suit against a savings bank for moneys on deposit, where persons claiming the fund, not parties to the action, are made defendants thereto.³³

§ 308. Forfeiture of Charter and Dissolution.—Where a savings company has no powers besides those common to all corporations, except to receive money from one dime and upward on deposit, to allow interest on it in accordance with the by-laws, and to loan the deposits, the closing of its doors, the cessation of business, and the temporary suspension of the company for seven days, will not operate a forfeiture of its charter absolutely, if no creditor complains.³⁴ A New Jersey statute authorizes the managers of a savings institution to dissolve it, if, at a meeting of the managers, "a resolution declaring the dissolution to be advisable be passed by a two-thirds vote of the whole board."³⁵ The attorney general of a state is not

was a statute V. S., § 4089, provided that, where action is brought against a savings bank for deposit, and there is a person, not a party to the action, who claims the same fund, the court, on the petition of the bank, may order the proceedings amended by making such claimant a party defendant.

33. Custody of fund in controversy pending suit.—Under the New York Statute, Laws 1882, p. 679, c. 409 (General Banking Act, c. 10), § 259, providing that, in an action against a savings bank for moneys on deposit, persons claiming that fund, not parties to the action, may be made defendants thereto, and the rights of the several parties in the fund determined, and that the fund may remain with such savings bank to the credit of the action until final judgment therein, or that it "may be paid into court to await the final determination of the action, and when so paid into court the corporation shall be stricken out as a party to such action," etc., where such claimants are substituted and the savings bank stricken out, the latter should not be directed to open a new account as a deposit to the credit of the action, but should be required to deposit the fund in court. *Faivre v. Union Dime Sav. Inst.*, 59 N. Y. Super. Ct. 558, 13 N. Y. S. 423. See, also, *McKeown v. Bank*, 26 Misc. Rep. 824, 56 N. Y. S. 1080, modifying 25 Misc. Rep. 797, 54 N. Y. S. 1106.

34. Acts not operating a forfeiture of charter.—*State v. Louisiana Sav. Co.*, 12 La. Ann. 568.

A fraudulent suspension of payment, or gross negligence in loaning money without sufficient guaranty, by which temporary suspension of payment

might ensue, would be different. *State v. Louisiana Sav. Co.*, 12 La. Ann. 568.

35. Dissolution of savings institutions under New Jersey statute.—Act of April 9, 1902 (P. L. 1902, p. 677, c. 224). *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131, affirming 64 N. J. Eq. 425, 54 Atl. 543.

Act April 9, 1902 (P. L. 1902, p. 677, c. 224), authorizes the managers of a savings institution to dissolve it, if, at a meeting of the managers, "a resolution declaring the dissolution to be advisable be passed by a two-thirds vote of the whole board." Gen. St. pp. 3001, 3002, §§ 8-11, providing for the organization of savings institutions, requires the state board to ascertain "whether greater convenience of access to a savings bank will be afforded to any considerable number of depositors"; "whether the density of the population * * * affords a reasonable promise of adequate support;" "whether the responsibility," etc., of the persons named in the certificate, is such "as to command the confidence of the community." Section 9 directs the board to issue the certificate if they are satisfied the bank will be of "public benefit." Section 11 directs that, if the board is not satisfied that the establishment of the bank "is expedient and desirable," they shall refuse. Held that, in determining whether dissolution is "advisable," the managers are to consider whether further continuance of the institution would be of "public benefit," and "expedient and desirable," as tested by the needs of a considerable number of depositors, by the density of the population, and by the reasonable promise of adequate support. Order 64 N. J. Eq. 425, 54 Atl. 543, af-

the only one who is entitled to maintain a bill to prevent the managers of a savings institution from dissolving it, but a depositor therein may, in her status as depositor, and also as a citizen of the community, maintain such a bill.³⁶

§ 309. Insolvency and Receivers—§ 309 (1) Power of Bank to Make Assignment for Benefit of Creditors.—In Pennsylvania a bank organized for savings, without power to issue notes, may make an assignment for benefit of creditors by its board of directors, without the consent of a majority of the stockholders having been first obtained, as required by the statute³⁷ for banks of issue.³⁸

§ 309 (2) When a Receiver Will Be Appointed.—Where a savings bank has become insolvent a receiver may be appointed to make distribution of its assets and to wind up its affairs.³⁹ But where the officers and depos-

ited. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

The mere fact that a trust company has been organized in the same community with a savings institution does not show that the dissolution of the latter is "advisable," the mode of investment adopted by trust companies being more hazardous than that allowed to savings institutions under the restrictions imposed on them by law, and they, therefore, being less adapted to the needs of persons of moderate means. *Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

In determining whether dissolution is "advisable," the managers must not be guided by their own personal pecuniary interests. *Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

It does not lie in the mouth of the managers of a savings institution who have themselves formed a trust company, which competes with it for savings deposits, to say that dissolution of the institution is advisable because of competition between it and a newly organized national bank. *Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

P. L. 1876, p. 346 (the savings bank act), made applicable by § 52 thereof to institutions already organized, expressly declares that "all vacancies in such board, by death, resignation or otherwise, shall be filled by the board of managers," etc., and the unwillingness of the present managers to continue in office is therefore no ground for dissolving the institution. *Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed.

Barrett v. Bloomfield Sav. Inst., 66 N. J. Eq. 431, 57 Atl. 1131.

36. Who may maintain bill to prevent dissolution of savings institution.—*Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

The fact that a depositor, in case of dissolution of a savings institution, will receive back his deposit and share in the surplus, can not prevent him from maintaining a bill to prevent the dissolution. *Order* 64 N. J. Eq. 425, 54 Atl. 543, affirmed. *Barrett v. Bloomfield Sav. Inst.*, 66 N. J. Eq. 431, 57 Atl. 1131.

37. Act of April 16, 1850, § 29 (1 Brightl. v. Purd. Dig., p. 145, pl. 103).

38. Power of bank to make assignment for benefit of creditors.—In *re Miners' Bank (Pa.)*, 13 Wkly. Notes Cas. 370.

39. When a receiver will be appointed.—Where a savings bank has ceased to do business and gone into insolvency, upon a creditor's bill filed by one of the creditors on behalf of himself and all other stockholders, creditors and depositors, against the bank and the president for a settlement of its affairs and distribution of its assets, the court will appoint a receiver to wind up its affairs. *Finney v. Bennett*, 68 Va. (27 Gratt.) 365.

The Maine statute, Act 1842, c. 32, is not unconstitutional, and by it the supreme court, sitting in equity, has the power to sequester the whole assets of an incorporated savings institution, on application of the trustees or a depositor, and place the same in the hands of a receiver, that a just and equitable distribution thereof may be made among all the depositors, according to the amounts due them, respec-

itors can agree on a settlement between themselves, it is not necessary that a receiver should be appointed.⁴⁰

§ 309 (2½) Duties and Powers of Trustees.—It is the duty of a trustee appointed to settle the affairs of an insolvent savings company to protect the trust property in every reasonable way, to get possession of the assets, reduce them to money, and under direction of the court apply the funds to the satisfaction of claims of creditors.⁴¹ Such a trustee has not, in the absence of a proper order of court, power to loan the funds of the trust.⁴² A general deposit by such a trustee of the trust funds in a bank is a loan to the bank, and unless authorized by court is a violation of duty.⁴³ But where such a trustee deposits trust money in a bank, taking as evidence thereof a certificate of deposit certifying that he as trustee has deposited the fund payable to self on return of the certificate properly endorsed, the same not being subject to check, and no stipulation for interest made, a presumption will be indulged, in the absence of proof to the contrary, that the trustee intended to perform and not violate his duty, and that the deposit was intended as a special, and not a general, deposit.⁴⁴

309 (3) Transfer of Property or Payment of Debts Prior to Appointment of Receiver.—When a savings bank is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, such officers are so far trustees that they may not transfer corporate property to themselves in payment of debts due them, and such a transfer constitutes a fraud in law.⁴⁵ And the same rule applies where the persons making the transfer, while not officers de jure, are in fact acting as officers and managing the business of the bank.⁴⁶ And where the

tively, whenever such institution shall not have sufficient assets to pay and discharge in full all just and legal claims upon it. *Savings Inst. v. Makin*, 23 Me. 360.

Petition presenting no ground for interference by equity.—A petition by a stockholder alleging that a savings bank is insolvent; that the directors are inefficient, and are about to make and enforce assessments for their own gain; and praying for a receiver, etc., but not charging fraud or breach of trust, held to present no ground for interference by a court of equity. *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180.

40. Settlement between officers and depositors precluding necessity of appointing receiver.—*Lewis v. Lynn Inst.*, 148 Mass. 235, 19 N. E. 365, 12 Am. St. Rep. 535, 1 L. R. A. 785.

41. Duty of trustee of insolvent savings company.—*Smith v. Fuller*, 86 O. St. 57, 99 N. E. 214.

42. Trustee has not power to loan funds.—*Smith v. Fuller*, 86 O. St. 57, 99 N. E. 214.

43. General deposit in bank is a loan.—*Smith v. Fuller*, 86 O. St. 57, 99 N. E. 214.

44. Presumption that deposit was intended as a special deposit.—*Smith v. Fuller*, 86 O. St. 57, 99 N. E. 214.

45. Officers may not transfer corporate property to themselves in payment of debts due them.—*Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841.

46. Where an insolvent savings bank, being largely indebted to a national bank, under the direction of whose officers the savings bank had in fact been managed, though nominally its business had been conducted by its own directors, the day before it goes into the hands of a receiver turns over to the cashier of the national bank cash and collateral, as security for its indebtedness, it is an illegal preference of de facto corpo-

officers of such a bank, just before insolvency, offer a depositor a note and mortgage for his deposit, and he accepts the offer, but there is no delivery, he has no title thereto.⁴⁷ But the mere fact of its insolvency will not preclude a savings bank, prior to its going into the hands of a receiver, from drawing a check in favor of a commercial bank, for the amount of its deposit in such bank, to be credited on a larger debt which it owes such bank.⁴⁸

§ 309 (4) Power of Court to Scale Down Deposits and Authorize Resumption of Business.—Under a statute declaring that when suit is brought against a savings institution, alleging its insolvency and demanding its dissolution, the court may grant such relief and render such judgment as the interest of the parties seem to require, the court may scale down deposits and authorize the resumption of business, where the effect of this will be to allow the institution to continue on a solvent basis.⁴⁹

§ 309 (5) Liability of Stockholders.—See ante, "Corporators and Stockholders," § 293.

§ 309 (6) Enforcement by Receiver of Liability of Officers.—The individual liability of a trustee of a savings bank for willfully co-operating with the other trustees in declaring and paying dividends where there are no surplus profits, may be enforced by the receiver.⁵⁰ By accepting securities for a loan improperly made by the managers of a savings bank, the receiver is not barred of his recourse against the managers.⁵¹

§ 309 (7) Recovery by Receiver on Bond Given to Enable Bank to Continue Business.—Where a bond payable to a savings bank, the capital of which has become impaired, is given for the purpose of being exhibited to the banking department as an asset, so that the bank may be enabled to continue business, and afterwards the bank becomes insolvent, the receiver may recover on the bond, even though the transaction is ultra vires.⁵²

§ 309 (8) Action by Receiver to Protect Bank against Unauthorized Assignment of Mortgage.—A bill may be maintained by the receiver

rate officers. *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841.

47. Offer of note and mortgage for deposit.—*Shattler v. Taft*, 7 O. Dec. 631, 4 Wkly. L. Bull. 419.

48. Drawing check in favor of commercial bank for amount of deposit therein.—*Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841.

49. Power of court to scale down deposits and authorize resumption of business.—*People v. Ulster County Sav. Inst.*, 133 N. Y. 689, 31 N. E. 738,

affirming 64 Hun 434, 18 N. Y. S. 960; S. C., 20 N. Y. S. 148, 46 N. Y. St. Rep. 748.

50. Individual liability of trustee may be enforced by receiver.—*Van Dyck v. McQuade*, 57 How. Prac. 62, 45 N. Y. Super. Ct. 620.

51. Effect of accepting securities for loan improperly made by managers.—*Dodd v. Wilkinson*, 41 N. J. Eq. 566, 7 Atl. 337.

52. Recovery by receiver on bond given to enable bank to continue business.—*Hurd v. Kelly*, 78 N. Y. 588, 34 Am. Rep. 567, affirming 17 Hun 327, note.

of a savings bank, whose treasurer made an unauthorized assignment of a mortgage owned by the bank, to restrain the assignee, who was a depositor, from enforcing a power of sale in the mortgage, and to compel him to surrender and cancel the assignment, although, upon receiving the assignment, he released the debt of the bank to him as such depositor.⁵³ But an assignee of mortgages may obtain a title by estoppel against the bank which will be a good defense in an action by the receiver to obtain a reconveyance of the mortgages.⁵⁴

§ 309 (9) Receiver's Sales.—It is not proper for the receiver of an insolvent savings bank to sell the bank's charter.⁵⁵ A savings bank, by consenting to the order appointing a receiver, which did not fix the terms or conditions or time of a sale of its property to pay debts, is not estopped from resisting a subsequent order of sale by the receiver.⁵⁶

§ 309 (10) Presentation of Claims.—Under a statute requiring creditors of insolvents to exhibit their claims, the filing of insolvent savings bank passbooks with the receiver, showing nonpayment of accrued interest, constitutes a sufficient presentation of claim for such interest.⁵⁷

§ 309 (11) Distribution and Application of Assets.—Managers of an insolvent savings bank, who have applied to the court of chancery to protect the interests of the depositors, are under the duty of converting the

53. Action to compel assignee to surrender and cancel assignment.—*Holden v. Phelps*, 135 Mass. 61.

54. Title by estoppel against bank.—In an action by the receivers of a savings bank to obtain the reconveyance of mortgages claimed to belong to them as receivers of the bank, it appeared that the secretary and treasurer of the bank fraudulently altered the record of a vote of the trustees authorizing him to discharge and release all mortgages belonging to the bank, by interpolating the word "assign," and then assigned one of the mortgages for full value to A. Held, that the evidence showed that the transaction was a sale, and not a pledge; that the purchase was made on A.'s own account, and not on account of the national bank, as claimed, and that the purchaser acted in good faith and without notice of any fraud; that it was immaterial whether the signature to a certified copy of the record received by the purchaser through the mail (sent, as he supposed, by the secretary in fulfillment of his promise to that effect) was a forgery of the secretary's name or not; and that the purchaser obtained a good title by estoppel against the bank. *Holden v. Whitney*, 29 Fed. 881. See,

also, *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431; *Holden v. Phelps*, 141 Mass. 456, 5 N. E. 815; *Whiting v. Wellington*, 10 Fed. 810.

55. Sale of bank's charter against public policy.—A creditor of an insolvent savings bank organized under Gen. Laws 1867, p. 33, c. 23, sought to procure an order directing the receiver to sell the bank's charter, which provided for the distribution of net proceedings after the payment of interest to depositors to the holders of the stock. Subsequent legislation returned all the net profits to the stockholders and prohibited trustees from having any interest in deposits. Held, that such an order would have sanctioned the bank's continued existence after the discharge of the receiver and have adjudicated that such existence should not be terminated by the judgment to be entered, and that such extension of special privilege was against public policy. *Douglas v. Savings Bank*, 102 Minn. 199, 113 N. W. 268.

56. Bank not estopped from resisting order of sale by receiver.—*State v. Fawcett*, 58 Neb. 371, 78 N. W. 636.

57. Sufficient presentation of claim for interest on deposits.—*Bank Comm'rs v. Watertown Sav. Bank*, 81 Conn. 261, 70 Atl. 1038.

assets into cash as rapidly as possible, without sacrifice, and making distribution among the depositors without unnecessary delay.⁵⁸ Money recovered by the receiver of an insolvent savings bank from the sureties and property of a defaulting treasurer of the bank partakes of all the characteristics of the money which it replaced, and should be distributed in accordance with the bank's charter.⁵⁹ Such money is applicable to the payment of unpaid interest on deposits, the principal of which has been paid in full and is not returnable to the treasurer's sureties.⁶⁰ A state statute providing that whenever any savings bank shall be found to be insolvent, the account of each depositor shall be reduced so as to divide the losses equitably amongst the depositors, is not unconstitutional, either as impairing the obligation of contracts, or as being contrary to the bankrupt law, or as being retrospective in its operations.⁶¹

§ 309 (12) Order of Payment—Preference—§ 309 (12a) As between Depositors—§ 309 (12aa) In General.—Depositors in savings institutions stand in the attitude of partners, and on insolvency of the institution become owner in common of the assets, and entitled to share the same after payment of privileged debts in the proportion which their respective deposits bear to the net amount ultimately to be realized.⁶² Where there is no proof that a deposit was taken by the bank as a special trust, or as a deposit differing materially from the other ordinary deposits of the bank, it is not entitled to preference in payment.⁶³ A depositor is not entitled to preference for the amount of a check given for a deposit, payment of which was refused by the bank on which it was drawn, for want of funds.⁶⁴

§ 309 (12ab) General or Special and Stockholding or Nonstockholding Depositors.—Whether in the distribution of the assets of an insolvent savings bank there shall be any preference as between the general or ordinary depositors, and so-called "special" depositors, is generally to be determined by the provisions of the charter or by-laws of the bank providing for and defining the different classes of deposits.⁶⁵ Depositors who are

58. **Duty of managers of insolvent bank.**—*In re Dime Sav. Inst.*, 29 N. J. Eq. 109.

59. **Application of money recovered from sureties and property of defaulting treasurer.**—*Bank Comm'rs v. Watertown Sav. Bank*, 81 Conn. 261, 70 Atl. 1038.

60. *Bank Comm'rs v. Watertown Sav. Bank*, 81 Conn. 261, 70 Atl. 1038.

61. **Statute providing for reduction of deposit accounts not unconstitutional.**—*Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491.

62. **Proportion in which depositors are entitled to share assets.**—*Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1.

63. *Vail v. Newark Sav. Inst.*, 32 N. J. Eq. 627.

64. **Check given for a deposit.**—*Stockton v. Mechanics', etc., Sav. Bank*, 32 N. J. Eq. 163.

65. **Special depositors not entitled to priority.**—A savings bank, under a special charter, was authorized to receive and invest deposits for the benefit of the depositors, the income or profit to be divided among them, after reasonable deductions for necessary expenses, the principal to be repaid to the depositors at such times, and with such interest, and under such regulations as the board of managers should, from time to time prescribe. Under their regulations they not only received deposits participating in the

not stockholders are to be preferred to depositors who are stockholders, and this preference is sometimes given by statute.⁶⁶ Therefore, where the or-

profits, and not payable except on thirty days' notice, but also another kind of deposits, called by them "special deposits," which were not to participate in the profits, and were to be repaid (not redelivered) to the depositors without any preliminary notice. Both kinds or deposits were intermingled in the funds of the bank indistinguishably. Under insolvent proceedings a receiver was appointed. Held, that such an institution is a mere trustee for the benefit of depositors, and the so-called "special" depositors were not entitled to priority in payment over the other class of depositors. *Stockton v. Mechanics'*, etc., Sav. Bank, 32 N. J. Eq. 163.

"General depositors" entitled to preference over "special depositors" for the guaranty fund.—The New Hampshire statute, Laws 1879, p. 420, c. 131, chartering a banking company, provided for two classes of depositors, designated as "general depositors" and "special depositors for the guaranty fund;" the former being entitled to interest and repayment according to contract, the latter being entitled to no interest, but to one vote for each \$100 deposited and to share in the net profits of the bank. The guaranty deposits were taxable as stock in banks, and the fund created by such deposits was required to be kept as a guaranty for the payment of the general deposits, which were entitled to precedence of payment. General depositors were paid $3\frac{1}{2}$ per cent interest until the bank went into liquidation, during which they received 100 per cent, but the interest on the deferred dividends at $3\frac{1}{2}$ per cent amounted to more than the sum in the hands of the receiver. Held, that the general depositors were entitled to interest on such deferred dividends as against the depositors for the guaranty fund. *Bank Comm'rs v. New Hampshire Banking Co.*, 74 N. H. 292, 67 Atl. 583.

Deposits held not to be special deposits.—Where a savings bank, having closed its doors, advertised that it would resume business by receiving deposits in trust to new account to be used only in paying checks against such account, such deposits are not special, though termed special separate deposits in the advertisement, but such new depositors became creditors

on an equality with the old depositors. *In re Mutual Bldg. Fund, etc.*, Sav. Bank, Fed. Cas. No. 9,976, 2 Hughes 374.

66. Nonstockholding depositors preferred to stockholding depositors.—The depositors of a savings bank agreed to incorporate it as a bank of capital. Books were opened for subscription of stock, depositors being given the preference, and funds in the bank were accepted in payment. A large amount of stock was taken, and the money paid in, and the persons subscribing, without waiting for all the stock to be taken, organized and began business. The subscription to the stock was unconditional. The bank was forced to suspend, and on liquidation dividends were paid on deposits, excluding those whose deposits were applied on stock. Held, that such stockholders were estopped to say that their subscriptions were conditional on the whole amount of the stock being taken, and they could not claim any rights as depositors. *Dallemand v. Odd Fellows' Sav. Bank*, 74 Cal. 598, 16 Pac. 497.

The California Statute, Act April 11. 1862, § 10 (St. 1862, p. 201), provides that the capital stock of savings banks shall be a security to depositors who are not stockholders, and the by-laws may extend the security to stockholding depositors. A bank borrowed money from a stockholding depositor, giving an instrument reciting that he had "deposited" the money payable to himself or order; "this certificate to run for one year from date, and not to mature before, and to bear interest. * * * Not subject to check." Thereafter the stockholder surrendered the certificate, receiving part of the money, and another certificate reciting merely that he had deposited money payable to himself or order, "not subject to check." Thereafter he surrendered the latter certificate, receiving a partial payment and similar instrument for the balance. The bank became insolvent before payment, and the claim was assigned to plaintiff. The bank's by-laws did not extend the security of the capital stock to stockholding depositors. Held, in a suit on the claim, that the transaction constituted a deposit, and not a loan, and hence nonstockholding depositors were entitled to preference over plain-

inary depositors are stockholders and the special depositors are not, the latter will be preferred.⁶⁷

§ 309 (12ac) Depositors in a Corporation Doing Both a Savings Bank and a Commercial Bank Business.—In the absence of some provision giving them a preference, savings depositors of a corporation doing both a savings bank and a commercial bank business are not to be given any preferences over commercial depositors;⁶⁸ and an agreement for such a pref-

tiff's claim. *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059.

Though the Act of March 12, 1864 (St. 1863-64, p. 158), amends the Act of 1862 (St. 1862, p. 201) so as to authorize savings banks having a certain capital stock incorporated under the Act of 1862 to transact also a commercial business, it leaves in force § 10 of the Act of 1862, which provides that the capital stock and assets shall be a security to depositors who are not stockholders, unless the same security should be extended by by-laws to depositing stockholders; and therefore a depositing stockholder of a bank which avails itself of the Amendment of 1862, even to the extent of transacting only a commercial business, is not, on the bank's insolvency, entitled to rank with nonstockholding depositors in the distribution of assets, where no such by-law was adopted. *Murphy v. Pacific Bank*, 119 Cal. 334, 51 Pac. 317.

67. A savings bank provided by its by-laws for three classes of depositors—weekly depositors, who were stockholders on the deposit of a minimum sum, special depositors, and irregular depositors. Plaintiff made a special deposit, receiving a certificate acknowledging receipt of the money on special deposit, at a specific rate of interest, if not drawn out within one year. Held, that the special deposit was, in effect, a loan creating an indebtedness on the part of the bank, and as such was a lien on the assets prior to the lien of weekly depositors, who were by the by-laws made stockholders. *Heironimus v. Sweeney*, 83 Md. 146, 34 Atl. 823, 33 L. R. A. 99, 55 Am. St. Rep. 333.

Certain depositors in the Maryland Savings Institution, incorporated in December, 1826, agreed with the institution that their deposits, which they were at liberty to withdraw at pleasure, should be converted into permanent stock. They afterwards received increased dividends thereon, and participated in the entire profits of the

institution, and large amounts of special deposits were made on the security of this stock. Held, that under these circumstances they were bound by an equitable estoppel from claiming an equality with the special depositors, on the insolvency of the institution, in payment of their claims based on their original deposits, or from making any attempt to shield the fund created by the conversion of their deposits into stock, from a liability to debts of the institution, contracted on the faith of its responsibility therefor. *Maryland Sav. Inst. v. Schroeder (Md.)*, 8 Gill & J. 93, 29 Am. Dec. 528.

68. Savings depositors not preferred to commercial depositors.—*People v. California, etc., Trust Co.*, 160 Cal. 374, 117 Pac. 321.

The provision of the California Statute, Civ. Code, § 573, "The capital stock and the assets of a savings and loan corporation are a security to depositors and stockholders, depositors having the priority of security over stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders," does not give a preferential lien to savings depositors over commercial depositors, in the case of a corporation doing both a savings bank and a commercial bank business. *People v. California, etc., Trust Co.*, 160 Cal. 374, 117 Pac. 321.

A corporation, doing both a savings bank and a commercial bank business, does not give its savings depositors a preferential lien over the commercial depositors by the provision in the books of the savings depositors, "The reserve fund, together with the guarantee capital and the assets of the corporation, shall form an absolute security to all depositors for their deposits and declared dividends. In consideration of the security thus afforded, each depositor * * * expressly waives all claim * * * on the individual stockholders * * * for any losses, and consents to look for * * * security solely to the guarantee capital, to the re-

erence between the corporation and savings depositors, not known of and consented to by the commercial depositors, is ineffective.⁶⁹ By a Colorado statute preference is given to savings depositors over commercial depositors.⁷⁰ In Michigan savings deposits and their increment are required to be held solely for the payment of savings depositors.⁷¹

§ 309 (12b) As between Creditors.—When a savings bank becomes insolvent, creditors, whose loans are prohibited by statute, should not be allowed to share with lawful creditors.⁷²

§ 309 (12c) As between Depositors and Creditors.—In New Hampshire, in the ordinary savings bank the general depositors in some respects are stockholders, and their claims in case of insolvency are postponed to the claims of creditors.⁷³ In New Jersey, upon winding up the affairs of an insolvent savings bank, the debts and expenses contracted by the bank in carrying on its ordinary business will be preferred.⁷⁴ But in New York the general creditors of a savings bank have no superior equity to the depositors to payment in case of deficiency of assets.⁷⁵ A statute providing that the assets and stock of a savings bank shall be security to depositors who are not stockholders, does not give priority to the claim of a depositor who is not a stockholder over the claim of a creditor of the bank who is also a stockholder thereof.⁷⁶ Though the charter of a bank provides that for the security of depositors a certain capital shall be raised previous

serve funds and the assets of the corporation;" but its purpose is to work a waiver by the depositors of the stockholders' liability. *People v. California, etc., Trust Co.*, 160 Cal. 374, 117 Pac. 321.

69. Agreement for preference not consented to by commercial depositors ineffective.—*People v. California, etc., Trust Co.*, 160 Cal. 374, 117 Pac. 321.

70. Who are "savings depositors" within Colorado statute.—Holders of time certificates of deposit, as well as holders of savings account passbooks, are "savings depositors," within the Colorado statute, *Mills' Ann. St.*, § 529, giving preference in case of insolvency of a bank to the savings depositors. *Tabor v. Mullin*, 37 Colo. 399, 86 Pac. 1007.

71. Savings deposits held solely for payment of savings depositors—Michigan statute construed.—2 Comp. Laws 1897, § 6118, declares that a bank doing a savings and commercial business shall keep separate books for each kind of business; that investments for the savings department shall be kept distinct, and that portion of savings deposits unloaned, deposited with other banks, and investments made with the funds deposited by savings

depositors, shall be held solely for the payment of the savings depositors. Held that, when a bank commingles its savings and commercial funds, on insolvency, it being possible to trace a fund invested in certain property as a fund derived from the savings deposits, it will be impressed with a trust in favor of the savings depositors. *Peters v. Union Trust Co.*, 131 Mich. 322, 91 N. W. 273.

72. Creditors whose loans are prohibited can not share with lawful creditors.—*State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500, construing Code, § 1855.

73. Priority as between depositors and creditors.—*Bank Comm'rs v. New Hampshire Banking Co.*, 74 N. H. 292, 67 Atl. 583; *Cogswell v. Rockingham, etc., Sav. Bank*, 59 N. H. 43.

74. Stockton v. Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

75. People v. Mechanics', etc., Sav. Inst., 92 N. Y. 7, reversing 28 Hun 375.

76. Effect of statute making assets and stock security to nonstockholding depositors.—*Laidlaw v. Pacific Bank (Cal.)*, 67 Pac. 897, construing Act of April 11, 1862, § 10.

to incorporation, "which capital shall at all times be liable to the depositors for the amount of their deposits," such capital can not be claimed exclusively by depositors.⁷⁷ The mere promise of a bank to use certain securities for the benefit of its savings depositors can not be held to create a trust or a lien in favor of the depositors.⁷⁸

§ 309 (13) Right of Depositor When Bank Receives Deposit with Knowledge of Its Insolvency.—When a bank has knowledge of its insolvency when a deposit is received, the depositor is entitled to have such deposit returned.⁷⁹

§ 309 (14) Set-Off of Deposit against Debt Due Bank.—Upon the insolvency of a savings bank, an ordinary depositor can not set off his deposit against a debt due from him to the bank;⁸⁰ and this is so though the

77. Effect of charter providing that capital shall be liable to depositors.—Fox's Appeal, 93 Pa. 406.

78. Effect of promise to use securities for benefit of depositors.—Ward v. Johnson, 95 Ill. 215.

79. Right of depositor when bank receives deposit with knowledge of its insolvency.—Chicago Title, etc., Co. v. Household Guest Co., 88 Ill. App. 126.

Facts raising presumption that bank had knowledge of its insolvency.—Where a savings bank, within an hour after a deposit was made, closed its doors, and its officers concluded within twenty-four hours that it was impossible to realize on the assets an amount sufficient to meet liabilities and enable the bank to continue in business, the bank was presumed to have had knowledge of its insolvency when the deposit was received. Chicago Title, etc., Co. v. Household Guest Co., 88 Ill. App. 126.

Checks deposited not mingled with general funds of bank.—An Illinois Statute, Rev. St., c. 38, § 25a, declares that the receipt of a deposit by a bank officer when the bank is insolvent is prima facie evidence of intent to defraud. Held, that where a party deposited checks, postal orders, and currency with a savings bank during its last business day, and the checks were not mingled with the general funds of the bank, as was the rest of the deposit, but came into the hands of and were collected by the receiver, the depositor was entitled to the proceeds thereof, since under the statute the acceptance of the funds was evidence of intent to defraud. Chicago Title, etc., Co. v. Household Guest Co., 88 Ill. App. 126.

80. Depositor can not set off deposit against debt due bank.—Osborn v. Byrne, 43 Conn. 155, 21 Am. Rep. 641; Cogswell v. Rockingham, etc., Sav. Bank, 59 N. H. 43; Hannon v. Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

Upon winding up the affairs of an insolvent savings bank, a depositor, who borrowed money from the bank, secured by his note or mortgage, can not offset his debt against the amount of his deposit at the time the decree of insolvency was made. Stockton v. Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

But in New York, where one who had given his bond and mortgage to a savings bank was also a depositor therein, and the bank became insolvent, and a receiver was appointed, it was held, that the mortgagor was entitled to a credit on his bond to the amount of his deposit at the time of the failure of the bank. New Amsterdam Sav. Bank v. Tartter (N. Y.), 4 Abb. N. C. 215.

And in Florida it has been held that where a party owes the bank a note, and also has a credit to his deposit account for deposits made while the bank is solvent, and not in contemplation of its insolvency, and the bank officials and such party, after the bank becomes insolvent, enter the amount of the balance due such party on his deposit account as a credit on the note, Rev. St., § 2193, relating to transactions taking place in contemplation of insolvency, is not violated, and such credit may be pleaded as a payment on the note in an action brought to recover on such note by a receiver subsequently appointed. Robinson v. Aird, 43 Fla. 30, 29 So. 633.

But it has been held that where a

debt is for borrowed money, and the deposit consists of such borrowed money.⁸¹ Neither the depositor's pledge of his deposit book to the bank as collateral security, nor the bank's expectation, at the time the debt is created, that he will apply his deposit in payment thereof, entitles him to set it off in payment of the debt.⁸² But where a person indebted to a savings bank as a borrower deposits an amount less than the debt, intending to use the money so deposited for a payment upon the debt, the amount deposited can be set off against the debt.⁸³ And where there is an executed agreement by the depositor that his deposit shall, on the next quarter day, be applied in payment of his debt, or where the deposit is a special deposit made to be withdrawn upon call, the depositor may set off the deposit against his debt.⁸⁴ An agreement by a savings bank to hold the deposit of one party as security for the overdrafts of another, is not enforceable by the debtor after the insolvency of the bank.⁸⁵ In some states there are statutes authorizing a deposit in a savings bank to be set off against a debt due the bank by the owner of the deposit.⁸⁶

§ 309 (15) Effect of Agreement to Credit Debt Due Bank with Amount Paid to a Depositor.—Where a savings bank procures a debtor to the bank to assume liability to a depositor, agreeing to credit the debt due the bank by such debtor with the amount paid by him, and the debtor legally assumes such liability with the consent of the depositor and the bank, payable at a future date, the fact that, before the payment to such depositor becomes due, the bank becomes insolvent and a receiver is appointed, will not affect

party indebted to a bank after it becomes insolvent purchases from certain depositors their deposits in the bank, and the amounts of such deposits so purchased are by the bank officials entered as credits on the debt owing by such party, such payments are invalid, under Rev. St., § 2193, and will not be binding on a receiver subsequently appointed, who sues to recover the debt owing by said party. *Robinson v. Aird*, 43 Fla. 30, 29 So. 633.

81. Deposit can not be set off though it consists of money borrowed from bank.—*Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378.

82. Facts not entitling depositor to set off deposit.—*Hall v. Paris*, 59 N. H. 71.

83. When deposit may be set off.—*Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641.

84. Hall v. Paris, 59 N. H. 71.

85. Agreement to hold deposit of one party as security for another's overdraft.—*Van Dyck v. McQuade*, 20 Hun 262, affirmed in 85 N. Y. 616.

86. Under a New Jersey statute in force in 1852, a debtor of an insolvent

bank, whether his indebtedness had actually accrued or not at the time of the insolvency, might have set off against his indebtedness to the receivers, either a deposit in the bank, or bills of the bank bona fide received by him before the failure of the corporation. *Van Wagoner v. Paterson Gaslight Co.*, 23 N. J. L. 283.

Under a Massachusetts statute, St. 1878, c. 261, providing that any person indebted to a savings bank may, in any proceeding for the collection of the debt, set off the amount of any deposit in said bank held and owned by him at the time of the commencement of such proceeding, an assignee of a deposit in a savings bank can set off the same against a claim of the bank, without a previous notice of the assignment. *North Bridgewater Sav. Bank v. Soule*, 129 Mass. 528.

But in an action by a savings bank against two persons on a joint and several note, the defendants can not set off, either under Gen. St., c. 130, § 8, or St. 1878, c. 261, the amounts severally due them from the bank. *Barnstable Sav. Bank v. Snow*, 128 Mass. 512.

the debtor's right to claim as a payment on his debt to the bank, in an action thereon by the receiver, the amount so paid by him to such depositor in pursuance of the arrangement.⁸⁷

§ 309 (16) Set-Off of Stockholder's Indebtedness to Bank against Amount Appropriable to His Stock.—An insolvent savings bank which has declared a pro rata distribution of its assets to its stockholders can not set off an indebtedness due the bank by a deceased stockholder, who was insolvent, against the amount appropriable to such stockholder's stock.⁸⁸ The right to such set-off was not given by the Pennsylvania Statute, Act of April 16, 1850, as that statute did not apply to savings and deposit banks, but only to banks of issue.⁸⁹

§ 309 (17) Assessments on Stockholders.—When Claim Becomes Liquidated.—Where an assessment is levied on stockholders of an insolvent savings bank, the claim becomes liquidated by the assessment, and draws interest from that time until paid.⁹⁰

§ 309 (18) Parties to Actions.—Action by Assignee.—An assignee of an insolvent savings bank may sue in his own name on the treasurer's bond.⁹¹

Actions by Receivers.—Receivers of savings banks may maintain suits in their own names or in that of the bank, and may purchase at execution sale in favor of the bank.⁹² Where a bank has become insolvent, the court may properly order that all stockholders be joined in an action to determine their liabilities on the shares of stock owned by them, and for a settlement generally of the affairs of the bank.⁹³ Although it is the general rule in equity that all persons interested in the subject matter of the litigation must be made parties, there are exceptions to this rule when it is

87. Effect of agreement to credit debt due bank with amount paid to a depositor.—*Robinson v. Aird*, 43 Fla. 30, 29 So. 633.

88. Indebtedness of deceased stockholder who was insolvent can not be set off.—*Merchants' Bank v. Shouse*, 102 Pa. 488.

89. Merchants' Bank v. Shouse, 102 Pa. 488. See, also, *Appeal of Parrish*, 133 Pa. 560, 19 Atl. 569.

90. Time from which assessment draws interest.—*May v. Ullrich*, 132 Mich. 6, 92 N. W. 493.

91. Assignee may sue in his own name on treasurer's bond.—*Hall v. Brackett*, 60 N. H. 215.

92. Receivers may maintain suits in their own names or in that of bank.—*Hobart v. Bennett*, 77 Me. 401.

To sue in his own name receiver must show special authority.—*Indiana statutes construed.*—Act May 28, 1852 (1 Rev. St. 1852) provides that any banking association violating any of

the provisions of that act may be proceeded against and dissolved in the same manner as any moneyed corporation. 2 Rev. St., p. 198, provides that if, in a proceeding against a corporation, judgment goes against it, the court shall appoint a receiver, who may do such acts as the court may authorize. 1 Rev. St., p. 239, § 6, continues as bodies corporate for three years corporations whose charters shall expire by limitation, forfeiture, or otherwise, to enable them to prosecute and defend suits. Held, that one styling himself receiver of a savings bank organized under the first-named act could not, without showing special authority, sue in his own name the stockholders to enforce their individual liability. *Herron v. Vance*, 17 Ind. 595.

93. Action for settlement of bank's affairs.—Court may order that all stockholders be joined.—*Herron v. Vance*, 17 Ind. 595.

impossible to give personal notice to all interested, and the notice given is the only one that can well be given; and such exceptions are applicable in a suit by a receiver of an insolvent savings bank to determine the question of preferences claimed by depositors.⁹⁴ Upon a bill by a receiver of a savings bank, charging its managers, as defendants, with liability for loss resulting from an improper loan of bank funds to third parties, such third parties are not necessary parties to the suit.⁹⁵

Actions by Depositors.—A suit against the officers of a savings bank which has been placed in the hands of a receiver for mismanagement of the corporate affairs may be brought by the depositors on refusal of the bank to bring the suit, yet, as the damages recovered would be assets of the bank, the receiver is a necessary party.⁹⁶

Action by One Person on Behalf of All Stockholders, Creditors and Depositors.—One person may file a creditor's suit on behalf of himself and all other stockholders, creditors and depositors, against a savings bank and its president, that has ceased to do business, for a settlement of its affairs and the distribution of its assets.⁹⁷

When Creditors Can Not Maintain Creditors' Bill against Debtor of Bank.—Under a statute authorizing courts to appoint assignees for insolvent savings banks, with power to collect and distribute among the creditors the funds thereof, and empowering the courts to restrain proceedings at law against such banks, the creditors of a bank so in the hands of an assignee can not maintain a creditor's bill against the debtor of the bank.⁹⁸

Commissioner of Banking Not Authorized to Maintain Action.—The Wisconsin statute providing for the regulation and supervision of the banking business within the state, does not authorize the commissioner of banking to maintain an action to administer the affairs of an insolvent savings bank as against creditors of the bank, authorized to maintain such action.⁹⁹

94. Suit to determine question of preference—Sufficiency of notice to persons interested.—*Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

A savings bank being insolvent, a large number of the depositors claimed preference over the rest, and were resisted by the other creditors. The bank's receiver petitioned the court of chancery for direction, giving notice by publication to all persons interested, and receiving an acceptance of service from the chairman of the depositors' committee. On the hearing, counsel appeared for many of the depositors claiming a preference, and that question was thoroughly tried. Held, that the decision bound the whole class. *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

95. When third parties not neces-

sary parties to suit against managers.—*Dodd v. Wilkinson*, 41 N. J. Eq. 566, 7 Atl. 337.

96. Action against officers for mismanagement of corporate affairs—Receiver a necessary party.—*Chester v. Halliard*, 34 N. J. Eq. 341.

97. Action by one person on behalf of all stockholders, creditors and depositors.—*Finney v. Bennett*, 68 Va. (27 Gratt.) 365.

98. When creditors can not maintain creditors' bill against debtor of bank.—*Brown v. Folsom*, 62 N. H. 527, construing Gen. Laws, c. 166, §§ 13-17, 19.

99. Commissioner of banking not authorized to maintain action to administer affairs of bank.—*Bergh v. Security Sav. Bank*, 122 Wis. 514, 100 N. W. 831, construing Laws 1903, p. 351, c. 234, and Rev. St. 1898, § 3219.

CHAPTER XVII.

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VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

§ 310. **Control and Regulation in General.**—It is within the power of the Legislature in enacting a general law for the creation, government, and control of all trust companies to impose, under given conditions, certain limitations upon the powers granted or to reserve to existing trust companies, brought under the act, certain powers already possessed by them under existing laws.¹ The Nebraska statute² providing for publicity of the conditions and business methods of installment investment companies, and

1. **Power of legislature.**—State *v.* affirmed 73 N. J. Law 683, 64 Atl. 1073. Twining, 73 N. J. L. 3, 62 Atl. 402, af- 2. Laws 1903, c. 29, p. 269.

providing for reasonable classification of companies for that purpose, is within the power of the legislature.³ By statute in some states trust or investment companies are required to deposit, with a designated officer of the state, security for the benefit or protection of creditors or investors,⁴ and in some jurisdictions loan and trust companies are required to make statements or reports to a designated officer or department of the state.⁵

3. Nebraska statute constitutional.—*State v. Northwestern Trust Co.*, 72 Neb. 497, 101 N. W. 14.

4. Statutory requirement that trust companies deposit security for benefit of creditors.—The imposition of active duties upon a trust company as trustee under a trust deed brings it within the prohibition of the Illinois statute, Act of 1887, as amended in 1889, regulating trust companies, making it unlawful for such a company to accept a trust before depositing with the auditor of public accounts, for the benefit of its creditors, the sum of \$200,000 in stocks of the United States, or municipal bonds of this state, etc. Judgment, 68 Ill. App. 666, affirmed. *Farmers' Loan, etc., Co. v. Lake St., etc., R. Co.*, 173 Ill. 439, 51 N. E. 55, reversed in 177 U. S. 51, 44 L. Ed. 667, 20 S. Ct. 564.

A foreign corporation, acting as a trustee with power to take possession of property and operate the same, receive money, and apply the same to expenses, including compensation for its services, must comply with Act June 15, 1887, § 9, requiring corporate trustees to deposit security. *Farmers' Loan, etc., Co. v. Lake St., etc., R. Co.*, 68 Ill. App. 666, affirmed in 173 Ill. 439, 51 N. E. 55, reversed in 177 U. S. 51, 44 L. Ed. 667, 20 S. Ct. 564.

Statutory requirement that investment companies deposit security.—The Missouri statute, Act April 21, 1893, requires bond investment companies to deposit with the state treasurer \$100,000 in cash or securities for the protection of investors. Held that, where the treasurer received from such a company a note for \$100,000, secured by trust deed of land, on which there was \$10,000 incumbrance, and \$10,000 in cash, it was competent for him to agree with the company to apply the cash to the discharge of the incumbrance as soon as the trustee would receive the money. *Stevenson v. Stephens*, 136 Mo. 537, 37 S. W. 506.

An Ohio statute, 93 Ohio Laws, p. 401, provides that every corporation and association other than a building and loan association doing business in that state in the way of placing or selling certificates, bonds, debentures

or other investment securities of any kind on the partial payment or installment plan, and every investment guaranty company doing business on the dividend service plan, shall, before doing business in Ohio, deposit with the treasurer \$25,000. Held, that a corporation which, in consideration of stipulated installments of money paid and to be paid, delivers to the payer a bond entitling him, upon conditions named, to receive an article of value, and requiring the payer to contribute to the payment of the expenses of the corporation, is subject to the provisions thereof. *State v. Tontine Surety Co.*, 62 O. St. 428, 57 N. E. 60.

Act April 25, 1898 (93 Ohio Laws, 401), regulating certificate bond and investment companies, does not require that the sum of \$25,000, to be deposited with the treasurer of state by a company doing in this state the business of placing or selling securities, etc., shall be derived wholly from its capital stock. *State v. Matthews*, 62 O. St. 146, 56 N. E. 658.

5. Statutory requirement that loan and trust companies make statements or reports.—In Illinois a foreign corporation, acting as a trustee with power to take possession of property and operate the same, receive money, and apply the same to expenses, including compensation for its services, must comply with the Act of June 15, 1887, § 9, requiring corporate trustees to render statements to the state auditor. *Farmers' Loan, etc., Co. v. Lake St., etc., R. Co.*, 68 Ill. App. 666, affirmed in 173 Ill. 439, 51 N. E. 55, reversed in 177 U. S. 51, 44 L. Ed. 667, 20 S. Ct. 564.

The Kentucky statute, St. 1909, § 593 (Russell's St., § 2182), requiring officers of banks to make quarterly reports to the secretary of state, applies to institutions doing both a banking and a trust business. *Anderson v. Commonwealth (Ky.)*, 117 S. W. 364.

In New York it has been held that a corporation authorized to establish a public exchange for receiving deposits of and transferring earnest moneys, stocks, bonds, and other securities procuring and making loans thereon, and guarantying the payment

§ 312. Incorporation and Organization.—The Georgia and Minnesota statutes providing for the incorporation of trust companies have been held to be constitutional.⁶ The provision in the constitution of New York,⁷ prohibiting the creation by special charter of corporations for banking purposes, does not apply to a trust company, the provision contemplating, in a popular sense, the business of banking.⁸ Where there is in a state, in addition to a general incorporation law, an act which provides for the incorporation of trust companies, and declares that thereafter no corporation shall be organized to carry on a trust company business in the state, except under such act, a proposed corporation, whose powers, as defined by its articles, are almost, if not wholly, confined to an agency or trust business, is not entitled to incorporate under the general law, though its articles do not include all the items or powers named in the act providing for the incorporation of trust companies.⁹ Some of the peculiar provisions of acts providing for the incorporation of trust companies have received the interpretation of the courts.¹⁰

of bonds and other obligations, is a "loan, mortgage, security, guaranty, and indemnity company," and a corporation "having the power of receiving money on deposit," within Acts 1874, c. 324, requiring reports from such corporations to the superintendent of the banking department. *People v. Mutual Trust Co.*, 96 N. Y. 10.

Under the Pennsylvania statute, Act June 8, 1891, a loan and trust company should report annually to the state banking department, rather than to the auditor general. In re McKinley-Lanning Loan, etc., Co., 12 Pa. Co. Ct. Rep. 40.

A loan and trust company incorporated under The General Corporation Act of 1874, though it receives no money on deposit, and guaranties no loans, must report its condition to the superintendent of banking, as required of all banking institutions by Act June 8, 1891. In re McKinley-Lanning Loan, etc., Co., 1 Pa. Dist. R. 551.

6. Statutes held constitutional.—The Georgia statute, Acts 1898, p. 78, authorizing the secretary of state to grant charters to trust companies with banking privileges, is not a violation of Const., art. 3, § 7, par. 18; the companies provided for in that act being embraced within the description "banking companies," as used in the constitution. *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S. E. 437.

The Minnesota statute, Laws 1883, c. 107, p. 133, providing for the incor-

poration of annuity, safe deposit, and trust companies, was not unconstitutional because of a defective title. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11.

7. Art. 8, § 4.

8. Provision in New York constitution not applicable to a trust company.—*United States Trust Co. v. Brady* (N. Y.), 20 Barb. 119.

9. Act under which proposed corporation is entitled to incorporate.—*State v. Nichols*, 40 Wash. 437, 82 Pac. 741, construing Laws 1903, c. 176, p. 367.

10. Act applies to companies incorporated under previous laws.—Act Cong. Oct. 1, 1890, 26 Stat. 625, providing for the incorporation of trust corporations within the District of Columbia, applies to trust companies incorporated under previous laws and which have complied with the provisions of the act. In re Turley, 9 Mackey (20 D. C.) 315.

Statute prohibiting company organized under any other act from using word "trust."—Under the Washington statute, Laws 1903, p. 367, c. 176, providing for the incorporation of trust companies, and declaring that no company hereafter organized under any other act shall use the word "trust" as part of its name, the change in the name of a pre-existing corporation so as to use the word "trust" as a part thereof is the creation of a new corporation, to that extent, and prohibited. *Asborne, etc., Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462.

§ 312½. **Merger.**—Under the reserved power of the state to alter or repeal corporate charters, the enactment of a statute authorizing the merger of trust companies, is a valid exercise of legislative power, as applied to specially chartered trust companies existing at the time of its enactment.¹¹ Domestic corporations organized as trust companies may not merge in the absence of statutory authority, and, where a statute authorizes a merger, the effect is exclusively what is declared by the act.¹² The peculiar provisions of the New York statutes relating to the merger of trust companies have been interpreted by the courts of that state.¹³

§ 313. **Stockholders.—Contract of Applicant for Stock Not Usurious.**—Where an applicant for stock in a trust company executes a bond and mortgage to the company for the amount of the stock at its par value, though its market value does not exceed 98, and the bond and mortgage is dated at the time his application is accepted by the committee, though the stock is not issued nor the securities delivered for thirty days thereafter, such contract is not usurious, since it is a sale of the stock, and not a loan of money.¹⁴

Liability of Stockholders for Debts of Corporation.—In most of the states there are statutes making the stockholders of loan and trust companies individually liable for the debts of the corporation. Under some of these statutes they are liable to the amount of the stock owned by them,¹⁵

11. **Statute authorizing merger of specially chartered trust companies valid.**—Order, 108 N. Y. S. 978, affirmed. *Colby v. Mt. Morris*, 191 N. Y. 510, 84 N. E. 1111, construing constitution of New York, art. 8, § 1, Rev. St. (1st. Ed.), pt. 1, c. 18, tit. 3, § 8, and Laws 1895, pp. 221-224, c. 382, §§ 34-38.

12. **Right to merge—Effect of statute authorizing merger.**—In *re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714.

13. **New York statutes authorizing merger of trust companies construed.**—Banking Law (Consol. Laws 909, c. 2), §§ 36, 39, 40, authorizing two or more trust companies to merge into another, and declaring that on the merger the rights and franchises of the corporation so merged shall be vested in the corporation into which it has been merged, etc., permits a trust company to merge itself into another, and a trust company which merges into another company, without surrendering its corporate existence, retains only its corporate entity, but otherwise it is nonexistent, and its property rights and interests vest in the company into which it is merged. In *re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714.

Under the New York Banking Law, Laws 1892, p. 1913, c. 689, § 163, providing that trust companies incorporated by special laws shall possess the powers of trust companies incorporated under the general laws, and shall be subject to such provisions of the banking law as are not inconsistent with the special laws, companies created by special acts in 1868 and 1871 (Laws 1868, p. 1807, c. 806, and Laws 1871, p. 1304, c. 604), and empowered by subsequent special acts (Laws 1873, p. 1269, c. 845, and Laws 1896, p. 1111, c. 839) to execute trusts, are subject to the provisions of the banking law, and a merger of such specially chartered companies is authorized by §§ 34-38, c. 582, pp. 221-224, Laws 1895, permitting merger of trust companies, though such merger was unlawful when such specially chartered companies were formed. Order, 108 N. Y. S. 978, affirmed. *Colby v. Mt. Morris*, 191 N. Y. 510, 84 N. E. 1111.

14. **Contract of applicant for stock not usurious.**—*Leavitt v. Pell* (N. Y.), 27 Barb. 322.

15. **Statutes making stockholders liable to amount of stock owned by them, construed.**—An annuity, safe deposit, and trust company organized under the Minnesota Statute, Gen. St.

while under others their liability extends to double the amount of such stock.¹⁶ Sometimes the charters of such companies impose a liability upon

1894, § 2841, et seq., is not a corporation "embracing banking privileges," within Const., art. 10, § 1, which refers only to banks of issue or circulation, provided for in art. 9, § 13, and hence its stockholders are liable under art. 10, § 3, for corporate debts to the amount of stock owned by them. *International Trust Co. v. American Loan, etc., Co.*, 62 Minn. 501, 65 N. W. 78, 632.

The Massachusetts Statute, St. 1905, p. 154, c. 228, amending Rev. Laws 1902, c. 116, § 30, making stockholders in trust companies liable for debts to an amount equal to the par value of their stock, did not create a new liability, but only enabled a receiver of such corporation to enforce a liability which was, both before and after, enforceable by creditors. *Nichols v. Taunton Safe Deposit, etc., Co.*, 203 Mass. 551, 89 N. E. 1035.

Under such statute, making stockholders of a trust company liable for debts equal to the par value of their shares, etc., provided a judgment has been recovered against the corporation and it has neglected for thirty days after demand by execution to pay the amount due or to exhibit to the officer property sufficient to satisfy the demand, and the execution has been returned unsatisfied, the expiration of thirty days, during which an opportunity has been afforded to disclose property of the corporation subject to the execution, must be shown by the officer's return; and hence, where an execution against a trust company was returned unsatisfied on the day of the demand, it was insufficient to sustain a creditors' action against stockholders, though the execution was not in fact filed for more than thirty days thereafter. *Nichols v. Taunton Safe Deposit, etc., Co.*, 203 Mass. 551, 89 N. E. 1035.

16. Statutes creating a double liability construed.—Under the Maryland Statute, Laws 1892, p. 153, c. 109 (Code, art. 23, § 851), providing that each stockholder of a bank or trust company shall be liable to depositors and creditors for double the amount of stock at the par value held by such stockholder in such corporation, such stockholders are liable for twice the par value of the stock held, in addition to the amount paid by them on their stock subscription. *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

But stockholders are not liable un-

der such statute for debts due depositors and creditors who became such prior to the time such stockholders acquired their stock. *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62.

The contractual rights of creditors of a trust company under the above statute is not impaired, in the case of one who has individually sued a stockholder, but has not obtained judgment, by Acts 1904, p. 597, c. 337, taking away the pre-existing remedy of any creditor to bring a separate action at law against any stockholder to enforce his liability, and substituting therefor the remedy by bill in equity on behalf of all the creditors against all the stockholders in the state, that act to become operative as of January 1, 1903, and to cause abatement of all pending actions instituted after that date. *Miners', etc., Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390.

The Maryland Statute, Code Pub. Gen. Laws, art. 23, § 85a (Laws 1892, p. 153, c. 109), provides that every safe deposit, guaranty, loan, and fidelity company incorporated under the laws of the state, or of any other state, or of any foreign country, doing business in the state, shall be subject to the provisions of the act. Section 851 (Laws 1892, p. 156, c. 109) provides that each stockholder shall be liable to depositors and creditors of any "such" corporation for double the amount of the stock at the par value held by such stockholders. Held applicable to a domestic corporation incorporated under a special charter to do a safe deposit, trust, and fidelity business. *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704.

The Pennsylvania Statute, Act May 11, 1874 (P. L. 135), imposing a double liability upon the stockholders of a bank, saving fund institution, trust company, or other corporation doing a banking business, does not apply to a trust company incorporated under The General Incorporation Act of April 29, 1874 (P. L. 73), and the supplements thereto, but only to those trust companies created by special acts prior to the adoption of the new constitution which were expressly given the right to engage in a banking business. *De Haven v. Pratt*, 223 Pa. 633, 72 Atl. 1068.

Nothing in Act May 24, 1881 (P. L. 22), Act May 9, 1889 (P. L. 159), or Act May 29, 1895 (P. L. 127), all supplemental to Act April 29, 1874 (P. L.

their stockholders which is separate and distinct from that created by the general statute pertaining to corporations.¹⁷ Under Iowa statutes it has been held that stockholders in an investment company, authorized by its charter to receive deposits of money, are not individually liable to creditors of the company.¹⁸ The charter liability of stockholders of a loan and trust company for "all contracts, debts, and engagements" of the company is not limited to the banking features of the company.¹⁹ Under the Massachusetts statute, it is no defense to an action by a creditor of a trust company to lay a foundation for enforcing the personal liability of stockholders, that before the date of the writ on a petition brought against it all the company's property had been put in receivership.²⁰

Actions to Enforce Liability of Stockholders.—By statute it is sometimes required that the holder of a claim against a trust company shall reduce it to judgment before suing the stockholders to enforce any liability on account thereof.²¹ In New York, where a trust company has been taken

73), and enlarging the powers of a trust company, can be construed to impose a double liability on its stockholders. *De Haven v. Pratt*, 223 Pa. 633, 72 Atl. 1068.

17. Liability under charter distinct from that created by general statutes.—The liability under Priv. Laws 1889, c. 443, the charter of a loan and trust company, providing that the shareholders shall be individually responsible, equally and ratably, for all contracts, debts, and engagements of the corporation, to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in the shares, is separate and distinct from that created by the general statutes pertaining to corporations (Rev. St. c. 46, § 47), so that such stockholders are not exempt from additional liability, even though the debt of the corporation is a mortgage debt. *Maine Trust, etc., Co. v. Southern Loan, etc., Co.*, 92 Me. 444, 43 Atl. 24.

18. Stockholders in investment company not individually liable.—An Iowa statute, Code, c. 1, tit. 9, amending Code 1873, c. 1, tit. 9, declared that all stockholders of banking corporations organized thereunder, buying or selling exchange, receiving deposits of money, or discounting notes, should be individually liable to creditors. Act 1860 required all associations organized under general laws for transacting a banking business, either in the way of buying or selling exchange, receiving deposits of money, etc., to make a certain report; but when the provision was carried into Code 1873, § 1570, the words "either in the way

of" were omitted. Held, that as such omission indicated an intent to make the language, "buying and selling exchange," etc., generally descriptive of the banking business only, chapter 1, tit. 9, did not apply to an investment company, the charter of which provided it might receive deposits of money, and hence the stockholders in such company were not individually liable. *Williams v. Lewis Inv. Co.*, 110 Iowa 635, 82 N. W. 332.

19. Liability for "all contracts, debts, and engagements."—*Maine Trust, etc., Co. v. Southern Loan, etc., Co.*, 92 Me. 444, 43 Atl. 24.

20. Action by creditor to lay foundation for enforcing stockholders' liability—Massachusetts statutes construed.—*Coyle v. Taunton Safe Deposit, etc., Co.*, 207 Mass. 441, 93 N. E. 791, construing Rev. Laws, c. 116, § 30, as amended by St. 1905, c. 228, Rev. Laws c. 110, § 60, c. 113, § 6, c. 116, § 37.

21. Necessity of reducing claim to judgment.—Under the New York Banking Law, Laws 1892, p. 1913, c. 689, art. 4, § 162, relating to trust companies, and making stockholders of such corporations individually responsible for existing debts of a corporation defaulting in the payment of any debt or liability contracted by it, where a trust company was not dissolved and was subject to suit, it was necessary for the holder of a claim against it to reduce such claim to judgment before suing the stockholders to enforce any liability on account thereof. Judgment, 100 N. Y. S. 1117, affirmed. *Gause v. Boldt*, 188 N. Y. 546, 80 N. E. 566.

charge of by the superintendent of banks, and it is essential to enforce a stockholder's liability to pay debts, an action at law will not lie on behalf of the superintendent of banks against a single stockholder to enforce his liability, but the same can be enforced only by a suit in equity where the liabilities of each and all may be equally and ratably ascertained and apportioned.²² An action to enforce the liabilities of stockholders of a trust company must be brought within the time prescribed by the statute of limitations.²³ The New York statute,²⁴ providing that, where a permanent receiver has been appointed and the corporation has been dissolved, actions or proceedings to enforce the liability of stockholders are to be prosecuted only in the name and on behalf of the receiver, unless the receiver refuses to take such action, applies only to banks and not to trust companies.²⁵

§ 314. Officers and Agents—§ 314 (1) Compensation.—Where, in an action by the president of a mortgage and trust company for a percentage of the profits, claimed to be due him as compensation, the evidence permits the drawing of different inferences, it presents a question for the jury.²⁶ Where in such an action a verdict for the plaintiff is against the weight of the evidence, it will be set aside.²⁷

§ 314 (2) Liability—§ 314 (2a) Liability of Officer on Accommodation Note Payable to the Company.—Where an officer of a trust company makes a note to a large amount, payable to the company, as an accommodation for the president of the company, on his assurance that he will never be asked to pay it, he is liable on the note, unless the company itself agreed that he should not be held on it.²⁸

22. Character of action.—*Cheney v. Scharmann*, 145 App. Div. 456, 129 N. Y. S. 993, construing Consol. Laws 1909, c. 2, § 196.

23. Trust company a "moneyed corporation" within meaning of New York statute of limitations.—A Kansas trust company, which is empowered to receive deposits and to loan money on real estate and personal security, must be deemed a "moneyed corporation" within the meaning of Code Civ. Proc. N. Y., § 394, prescribing a three-year limitation for actions to enforce stockholders' liabilities, in view of the definition of that term in Rev. St. N. Y. p. 598, § 51, as one having the power to make loans upon pledges or deposits, and of the further definition of a moneyed corporation in The Revised Corporation Act of 1890, as one formed under, or subject to, the banking or insurance law. Judgment, 54 C. C. A. 683, 118 Fed. 1019, affirmed. *Platt v. Wilmot*, 193 U. S. 602, 48 L. Ed. 809, 24 S. Ct. 542.

The term "moneyed corporation," as used in Code Civ. Proc. N. Y., § 394, which prescribes the limitation gov-

erning actions against stockholders of moneyed corporations, if defined in accordance with the new corporation law of 1892, is broad enough to include a mortgage trust company of another state, authorized to issue and sell its debenture bonds secured by mortgages, if it does business within the state of New York. *Hobbs v. National Bank*, 41 C. C. A. 205, 101 Fed. 75, denying rehearing in 37 C. C. A. 513, 96 Fed. 396.

24. Banking Laws (Consol. Laws 1909, c. 2), § 71.

25. New York statute requiring that action be brought by receiver not applicable to trust companies.—*Cheney v. Scharmann*, 145 App. Div. 456, 129 N. Y. S. 993.

26. When evidence as to compensation presents a question for jury.—*Young v. United States Mortg., etc., Co. (Sup.)*, 131 N. Y. S. 33.

27. Verdict set aside as against the weight of the evidence.—*Young v. United States Mortg., etc., Co. (Sup.)*, 131 N. Y. S. 33.

28. Liability of officer on accommo-

§ 314 (2b) Liability for Converting Money Collected.—Where the managing agents of a trust company mingle money collected for another with the current funds of the company for use in its business, in violation of the express directions of the owner to remit, or knowingly permit their subordinates to do so, and the fund is thereby lost, such agents are personally liable to the owner thereof, though at the time of such misappropriation it was the intent of such agents to account for and return the money to the owner on demand.²⁹

§ 314 (2c) Liability of Directors for Losses Occasioned by an Ultra Vires Act.—Where directors of a trust company knew of the purpose of the company to issue a prospectus to encourage the purchase of securities in a venture, which was an ultra vires act, they are liable for losses occasioned thereby, whether or not parties borrowing money from the company can defend an action on their notes on account of the false statements in the prospectus.³⁰

§ 314 (2d) Liability of Directors for Losses Resulting from Their Negligence.—The directors of a trust company are liable for losses resulting from the misconduct or mismanagement of subordinate officers, if, had such directors been diligent in the discharge of their duties, they could have prevented or lessened such losses.³¹ But a director who is necessarily absent on account of his wife's serious illness is not liable for losses occasioned by the negligent acts during his absence of other directors.³²

§ 314 (2e) Liability of Executive Committee for Failure to Examine Loans.—Where, under the by-laws of a trust company, it was the

dation note payable to the company. —*Chestnut St. Trust, etc., Co. v. Hart*, 217 Pa. 506, 66 Atl. 870.

29. Liability for converting money collected.—*Sweet v. Montpelier Sav. Bank, etc., Co.*, 73 Kan. 47, 84 Pac. 542.

In an action against the officers of a trust company for the conversion of the proceeds of a collection made by the corporation of which they were the principal officers, evidence held to sustain judgment for plaintiff. *Sweet v. Montpelier Sav. Bank, etc., Co.*, 73 Kan. 47, 84 Pac. 542.

30. Liability of directors for losses occasioned by an ultra vires act.—*State v. Barnes*, 108 Minn. 230, 122 N. W. 11; *S. C.*, 108 Minn. 527, 122 N. W. 12.

31. Liability of directors for losses resulting from their negligence.—The directors of a trust company, taking vacations without making reasonable provision for meetings of the board or the executive committee, assume the

risk of misconduct or mismanagement of the officers, occasioning loss, and if, in the discharge of their duties, they could have prevented or lessened the loss, they can not escape liability therefor by pleading that they were on their vacations, in accordance with the custom at the time of year, of directors of trust companies. *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

Directors of a trust company who, had they attended meetings of the executive committee, or board of directors, on a certain day, would have ascertained that certain loans were being improperly made and could have protected the company against the repetition of such misconduct, were not excused from negligence in allowing losses on similar loans by reason of improper or imprudent acts of executive officers. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11.

32. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11; *S. C.*, 108 Minn. 527, 122 N. W. 12.

duty of the executive committee to require all loans and investments to be reported to it at its next meeting for approval, failure of the committee to examine such loans is not excused by the fact that the loans were not presented to the committee; it being its duty to require them to be presented.³³

§ 314 (2f) Directors Can Not Delegate Their Responsibility.—While directors of a trust company may delegate their work, they may not delegate their responsibility, and hence they are not excused from liability for losses suffered by the company because they committed their duties to an executive committee, relying upon it to examine the loans and collateral.³⁴

§ 314 (2g) Criminal Liability.—See ante, "Criminal Responsibility," § 60; "Criminal Responsibility on Insolvency," § 83.

§ 315. Functions and Dealings—§ 315 (1) In General.—A trust company has those powers only that are conferred upon it by its charter and the statute law of the state, and is strictly limited to the exercise of such powers in such manner and by such agents as its charter and the law permits.³⁵ Its charter is a contract between the state and the stockholders, which will be construed strictly, and no powers will be implied.³⁶ Speculative undertakings, entered into by a trust company, subject to hazard and contingency of gain or loss, are ultra vires, and a perversion of the powers conferred by its charter.³⁷ Contracts of investment security, debentures or certificates, which can not reasonably be expected to accumulate a reserve fund equal to the stipulated endowment values within the stated period without aid from lapses or appropriation from premiums on new business, are fraudulent, contrary to public policy, and unlawful.³⁸ Some of the peculiar provisions of statutes conferring powers upon trust companies have been interpreted by the courts.³⁹ The contract of a trust company, though

33. Liability of executive committee for failure to examine loans.—*Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

34. Committing duties to executive committee will not excuse directors from liability.—*Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

35. Powers of trust companies in general.—*Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

36. No powers will be implied.—*Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

37. Speculative undertakings are ultra vires.—*Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

A trust company issuing a prospectus to encourage the purchase of securities in a venture acts ultra vires; the

fact that Banking Law (Laws 1892, p. 1857, c. 689), § 25, contains no provision forbidding such issuance, not warranting a holding that no such restriction exists, and the company is not liable for false statements in such prospectus. *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. S. 758.

38. When contracts of investment security, debentures or certificates are unlawful.—*State v. Interstate Sav. Inv. Co.*, 64 O. St. 283, 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754.

39. Power to execute note for benefit of railroad company.—A trust company organized under Rev. St. 1899, § 1427, authorizing such companies to act as agent or attorney in fact in the management of property, execute trusts, act as executor or guardian, guaranty the fidelity of persons or corporations holding places of trust, loan money on collateral security, buy

ultra vires, will nevertheless be enforced where either the person with whom the corporation has contracted or the corporation itself has received the full benefit thereof.⁴⁰

§ 315 (2) Representation by Officers and Agents—§ 315 (2a) In General.—The doctrine of respondeat superior applies to a trust company acting as trustee, and the company is liable for any fraud or bad faith on the part of its agent to whom the directors have intrusted the business, though the directors are not personally guilty of fraud or bad faith.⁴¹ But one who deals with the agent of a trust company with knowledge of his agency is bound to ascertain the nature and*extent of his authority, and the burden rests upon him to show that the agent had authority to do what he did.⁴² The right of a trust company to guarantee a sale of certain stock

and sell securities, etc., has power to execute a note for the benefit of a railroad company which it was financing. *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79.

Power to take a transfer of a note.—By the New York statute, Laws 1892, c. 689, § 156, a trust company has power to receive deposits, to loan money "to purchase, invest in, and sell stocks, bills of exchange, bonds, and mortgages and other securities," and, by § 159, to invest moneys received by it in such securities as it may deem proper. Held authorized to take a transfer of a note, and to recover thereon against the maker. *Binghamton Trust Co. v. Clark*, 32 App. Div. 151, 52 N. Y. S. 941, 28 Civ. Proc. R. 1.

Powers applicable to trusts for married women only.—The general powers to be exercised under the Missouri statute, Rev. St. 1889, § 2839, cl. 5, authorizing trust corporations to accept and execute trusts for married women in respect to their separate property, and "generally to have and exercise such powers as are usually had and exercised by trust companies," applied to trusts for married women only. *Crow v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593.

Contract guaranteeing sale of bonds and stocks ultra vires.—A trust company was organized under the New York statute, Laws 1892, p. 1842, c. 689. Its vice president, with the consent of its president, but without the knowledge of its directors, signed an instrument under seal, in the name of the corporation, guaranteeing to the owner of certain bonds and stocks the sale thereof before a certain date at not less than a certain sum. The trust company at the time owned no bond

or stock of such corporation, nor was it interested in the sale of its securities, otherwise than by the commission it might acquire. Held, that the contract was ultra vires. *Gause v. Commonwealth Trust Co.*, 55 Misc. Rep. 110, 106 N. Y. S. 288, judgment affirmed in 124 App. Div. 438, 108 N. Y. S. 1080.

No new powers were given to trust companies generally by the provision of Laws N. Y. 1892, c. 689, § 163, that "every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company." Judgment, 163 N. Y. 320, 57 N. E. 408; affirmed. *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905.

40. When ultra vires contract will be enforced.—*Gause v. Commonwealth Trust Co.*, 55 Misc. Rep. 110, 106 N. Y. S. 288.

Where a trust company guaranteed to plaintiff to sell certain stocks and bonds for him at a certain time at a fixed price, but there was no delivery to the company of such securities, there was no such performance by plaintiff as entitled him to recover on the ground that the contract of a corporation will be enforced, where the corporation has received the full benefit thereof, though it be ultra vires. *Gause v. Commonwealth Trust Co.*, 55 Misc. Rep. 110, 106 N. Y. S. 288, judgment affirmed in 124 App. Div. 438, 108 N. Y. S. 1080.

41. Doctrine of respondeat superior applies to a trust company.—*Minneapolis Trust Co. v. Menage*, 73 Minn. 441, 76 N. W. 195.

42. Necessity of ascertaining nature

and bonds at a specified price within a certain time being questionable, the holder of the stock is put on inquiry as to the authority of an officer of the company to execute a guaranty of that nature on behalf of the company.⁴³ If the agent of a trust company, in the course of the business in which he is employed, commits an independent fraud for his own benefit, designedly against his principal, and it is essential to the carrying out of the fraud that he should conceal the real facts from his principal, the presumption of constructive notice to the principal is destroyed, and the inference is rather that no communication was made.⁴⁴

§ 315 (2b) President.—A trust company acting as trustee is liable for any fraudulent act of its president done in his official capacity,⁴⁵ and the

and extent of agent's authority—Burden of proof.—*Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888.

Plaintiff trust company, having undertaken to aid a railroad contractor to extend his existing indebtedness and to obtain further funds to complete his contract, sent its agent to another city with bonds of its own with specific instructions as to their use. The agent, finding that defendant bank was about to foreclose a pledge of the contractor's securities for an overdue debt, in disobedience of his instructions, promised that plaintiff would pay the interest on the debt, and pledged some of plaintiff's bonds as security. The bank knew that the bonds belonged to plaintiff, and that the agent was acting on special instructions as to their use, and of the general purpose to which they were to be put. Other creditors, learning of the bank's action, refused to extend the contractor's indebtedness without payment of interest, and the whole plan failed. Held, that the bank was bound to inquire as to the scope of the agent's authority, and could not hold the pledged bonds against the plaintiff when it repudiated the transaction. *Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888.

In replevin by the trust company to recover such bonds, it was proper to admit in evidence the written instructions to the agent showing that he had no authority for his act, where the fact of agency and defendant's knowledge thereof at the time of the transaction had already been shown. *Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888.

Nor was there any error in excluding offered evidence that the agent, when acting under written instruc-

tions, had sometimes acted beyond their scope and in accord with his own discretion, and that his acts had been ratified by the company, in the absence of any offer to show an exercise of discretion extending to the binding of the company by a promise to pay the debt of a third person and a pledge of the company's securities therefor. *Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888.

43. Holder of stock put on inquiry as to authority of officer to guarantee its sale.—*Gause v. Commonwealth Trust Co.*, 55 Misc. Rep. 110, 106 N. Y. S. 288, affirmed in 124 App. Div. 438, 108 N. Y. S. 1080.

44. When presumption that agent's knowledge is that of principal does not exist.—*Camden Safe Deposit, etc., Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607.

Where the president and cashier of a trust company embarked in a partnership undertaking with an executor, who executed a mortgage to the trust company on property of the estate, the proceeds being used in the partnership venture, and not for the benefit of the estate, the knowledge of the president and cashier of the trust company of the fraudulent misapplication of the sum realized by the mortgage was not imputable to the trust company, and the mortgage was enforceable in its hand. *Camden Safe Deposit, etc., Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607.

45. Fraudulent use by president of bonds in company's possession as trustee.—Where certain bonds of a corporation were placed in the possession of defendant trust company, as trustee, to be certified as called for, the fact that they were left in defendant's possession after the mortgage securing them had been satisfied, did

knowledge of the president is presumed to be that of the company.⁴⁶

§ 315 (2c) Secretary.—The fact that an investor, after having become acquainted with the secretary of an investment company, who is also a lawyer, through her dealings with the company, consults him with reference to certain independent legal matters, does not affect the liability of the company to her for funds invested by her with it through the secretary, and embezzled by him.⁴⁷

§ 315 (2d) Treasurer.—Where a trust company receives bonds of plaintiff, and sells them, and holds the proceeds, it is estopped from setting up want of authority of its treasurer to bind it by a certificate issued by him to the owner of such bonds.⁴⁸

§ 315 (2e) A Director Who Is Manager of the Bond Department.—A director of a trust company who is manager of its bond department has no authority by virtue of either position to bind the company by a promise to pay the debt of a third party to a bank and a pledge of the trust company's bonds to secure such payment.⁴⁹

§ 315 (2f) Cashier and Bookkeeper.—Where the cashier and bookkeeper of a trust company assist in the hypothecation of certain shares of its stock to a bank as security for a loan made by the bank to one of its stockholders, and have full knowledge that such stock has been so pledged, such knowledge is the knowledge of the company, and it can not thereafter re-

not entitle defendant to claim any rights under the bonds as against the corporation, where defendant's president, by virtue of his office, certified the bonds and used them as collateral to cover his own defalcations. *Washington, etc., R. Co. v. Real Estate Trust Co.*, 177 Fed. 306.

46. Knowledge of president presumed to be knowledge of company.—A trust company, acting as administrator, deposited funds of the estate in an insolvent bank; the president of the trust company being president of the bank. Held, that his knowledge of the bank's condition was the knowledge of the trust company, in a controversy between it and the distributees of the estate, though the rule might be otherwise in a controversy between the two corporations. *Germania Safety Vault, etc., Co. v. Driskell*, 23 Ky. L. Rep. 2050, 66 S. W. 610.

Company not chargeable with president's knowledge where he took no part in transaction.—The president of a trust company, acting at attorney for other parties, negotiated the execution of a mortgage to his clients. The mortgage was subsequently as-

signed to the trust company, it not appearing who conducted this transaction on its behalf. Held, that the company was not chargeable with any knowledge its president may have had in regard to the purpose for which the mortgage was given. *Tate v. Security Trust Co.*, 63 N. J. Eq. 559, 52 Atl. 313.

47. Facts not affecting liability of company for funds embezzled by secretary.—Judgment, *Ring v. Long Island Real Estate, etc., Inv. Co.*, 93 App. Div. 442, 87 N. Y. S. 682, affirmed. *Ring v. Howell*, 184 N. Y. 553, 76 N. E. 1107.

Facts held insufficient to show that an investor dealt with the secretary of an investment company as an individual, and not in his official capacity as the company's representative. Judgment, *Ring v. Long Island Real Estate, etc., Inv. Co.*, 93 App. Div. 442, 87 N. Y. S. 682, affirmed. *Ring v. Howell*, 184 N. Y. 553, 76 N. E. 1107.

48. Estoppel to set up want of authority of treasurer.—*Callendar v. Kelly*, 190 Pa. 455, 42 Atl. 957.

49. Director has no authority to bind company to pay debt of third party.—*Interstate Securities Co. v. Third Nat. Bank*, 231 Pa. 422, 80 Atl. 888.

fuse to transfer the stock to the bank on the nonpayment of the loan on the ground that it has a lien on the stock for an indebtedness to it, created subsequent to the pledge.⁵⁰

§ 315 (2g) Paying Teller.—Where a paying teller of a trust company, exercising the functions of a banking company certifies a check of a depositor, evidence that such teller was in the habit of making such certifications for the benefit of payee of checks, and that all checks so certified were paid and taken up by the trust company, is sufficient to establish the agency of such teller in certifying such checks.⁵¹

§ 315 (2h) Actuary.—Where the actuary of a trust company is held out to the public as competent to transfer securities belonging to the company in satisfaction of debts, such a transfer by him, where there is no fraud nor departure from established usage, and the transaction is advantageous to the company, is binding upon the company.⁵²

§ 315 (2i) Dealings Through a Mutual Agent.—Where a trust company, as principal, receives through the intervention and the wrongful act of a mutual agent the property of the other principal, the mutual agent acting for and in fraud of both, the trust company is chargeable with a knowledge of the wrong, which was possessed by the mutual agent, and may not avail itself of the results of its agent's fraud without responsibility for the fraud.⁵³ But the fact that a railroad company knows that one of its officers is also president of a trust company does not charge the railroad company with knowledge of such officer's dishonesty in the manipulation of its bonds in the hands of the trust company, as trustee, nor does it show that it

50. Hypothecation of stock by cashier and bookkeeper.—*Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600.

And this is so, although such indebtedness was created after the cashier's death by officers having no knowledge of the loan by the bank. *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600.

51. Evidence establishing agency of teller to certify checks.—*Muth v. St. Louis Trust Co.*, 88 Mo. App. 596.

52. Transfer by actuary of securities in satisfaction of note.—The Freedman's Savings & Trust Company, through its agent, with the knowledge and consent of its trustees, borrowed money of A., and gave him therefor a note signed by its actuary, who afterwards transferred to A., in satisfaction thereof, certain securities belonging to the company. The actuary was held out to the public as competent to make such an exchange.

There was no fraud nor departure from established usage, and the transaction was advantageous to the institution. Held, that the commissioners appointed to wind up the affairs of the company were not entitled to a decree that A. surrender to them the securities. *Creswell v. Lanahan*, 101 U. S. 347, 25 L. Ed. 853.

53. Dealings through a mutual agent.—*Washington, etc., R. Co. v. Real Estate Trust Co.*, 177 Fed. 306, 312.

Where defendant trust company, through the intervention and fraud of its president, who was acting as the mutual agent of both defendant and complainant, received complainant's bonds, and defendant's president used the bonds as collateral for defalcations covered by loans to fictitious persons, defendant was not entitled to avail itself of the result of its president's fraud without responsibility therefor, and was therefore bound to return the bonds. *Washington, etc., R. Co. v. Real Estate Trust Co.*, 177 Fed. 306.

expected to obtain any unlawful advantage from such officer's official connection with the trust company.⁵⁴

§ 315 (3) Deposits—§ 315 (3a) Powers in Relation to.—In some jurisdictions there are statutes authorizing trust companies to receive deposits.⁵⁵ Under a statute empowering trust corporations to receive moneys, and to allow such interest thereon as may be agreed, such corporations have neither express nor implied authority to receive money on general deposit, upon which no interest is allowed, to be paid out on demand.⁵⁶ In the absence of statutory provisions on the subject, a trust company authorized to receive money on deposit has lawful authority to issue certificates of deposit therefor in the usual form.⁵⁷ If the power exists in a trust company, to receive moneys on general deposit and to pay them out on demand, the implied power exists to adopt such method as the company may think best comports with the order of business as to the way the money shall be paid out, whether that be upon check or otherwise; and this notwithstanding a check, strictly speaking, must be drawn upon a bank or banker.⁵⁸

§ 315 (3b) Estoppel to Plead Incapacity to Certify Checks.—Where a trust company has fully entered into the banking business, and keeps the accounts of its depositors and pays checks against them as if it had been organized for that purpose, it can not plead incapacity to certify checks on the ground that it was not chartered as a bank.⁵⁹

§ 315 (3c) To Whom Payments May Be Made.—A certificate of deposit payable to one as special guardian of another is payable to the

54. Washington, etc., *R. Co. v. Real Estate Trust Co.*, 177 Fed. 306.

55. **Statutes conferring authority to receive deposits.**—A New York statute, Laws 1822, c. 50, incorporated the Farmers' Fire Insurance & Loan Company, and provided that nothing in the act should be construed to authorize it to receive any deposit or deposits, or to exercise any banking privileges. Laws 1836, c. 211, changed the name of said corporation to the Farmers' Loan & Trust Company, and declared that nothing contained in the act should be construed to confer on the corporation any powers other than those conferred by the original act of incorporation; and Laws 1890, c. 433, conferred on the corporation, in addition to the powers already possessed, the power to take, accept, and execute all trusts of every description. Laws 1892, c. 689, § 163, conferred on every trust company incorporated by special law the powers of trust companies incorporated under said banking law; and § 156 authorized trust companies formed under the banking act to receive deposits of trust moneys and

securities. Held, that the defendant trust company had the right to receive deposits, since by the Act of 1892 it became a trust company incorporated by special law, and entitled to the benefit of the provisions of the banking act, and the prohibition in the original act of incorporation against receiving deposits was thereby annulled. Judgment, 54 App. Div. 271, 66 N. Y. S. 773, affirmed. *Venner v. Farmers' Loan, etc., Co.*, 176 N. Y. 549, 68 N. E. 1125.

56. **No authority to receive money on general deposit to be paid out on demand.**—*Crow v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593, construing Rev. St. 1889, § 2839, cl. 1.

57. **Authority to issue certificates of deposit.**—*Bank v. Title, etc., Co.*, 105 Fed. 491.

58. **Implied power as to way money deposited shall be paid out.**—*Crow v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593.

59. **Estoppel to plead incapacity to certify checks.**—*Muth v. St. Louis Trust Co.*, 88 Mo. App. 596.

former personally, those words being merely *descriptio personæ*.⁶⁰ But where a special guardian of an infant deposits the latter's money in a trust company which has notice that the owner is an infant, it is chargeable with notice of the order of court requiring the deposit to be made to the infant's credit, and is liable to the latter for payment to the guardian without special order of court.⁶¹ A trust company will be protected in paying a certificate of deposit, though it has been assigned, if the company has no knowledge thereof, by a statute, authorizing the transferee of a claim on demand to sue thereon, subject to any defense existing against the transferor before notice of transfer, as payment is thereunder a complete defense.⁶²

§ 315 (3d) Rights of Depositor and Company When a Check Is Deposited.—Where a check is deposited with a trust company, with authority to collect, the proceeds of the check, when actually collected by the company or its agent, become the property of the company, which then becomes indebted to the depositor for the amount of the check.⁶³ But where a check is received by a trust company specifically for collection, and is by it forwarded to its correspondent specifically for collection, but is not collected until after the trust company has failed, the correspondent is responsible to the depositor for the proceeds of the check, as in such case the latter remains the owner of the check.⁶⁴

§ 315 (3e) Interest on Deposits.—Trust companies must pay interest on a deposit to the credit of another in order to acquire the right to receive the same and pay it out on checks and drafts of the depositor.⁶⁵

60. Deposits made by a special guardian.—*Walker v. State Trust Co.*, 40 App. Div. 55, 57 N. Y. S. 525, reversing, 24 Misc. Rep. 498, 53 N. Y. S. 849.

61. *Walker v. State Trust Co.*, 40 App. Div. 55, 57 N. Y. S. 525, reversing 24 Misc. Rep. 498, 53 N. Y. S. 849.

62. Assignment of deposit—When company protected in paying to assignor.—Judgment, 39 Misc. Rep. 98, 78 N. Y. S. 900, affirmed. *Zander v. New York, etc., Trust Co.*, 81 App. Div. 635, 81 N. Y. S. 1151, affirmed in 178 N. Y. 208, 70 N. E. 449, 102 Am. St. Rep. 442.

63. Rights of depositor and company when a check is deposited.—*King v. Bowling Green Trust Co.*, 145 App. Div. 398, 129 N. Y. S. 977.

The payee of a check opened an account with C. Trust Company, and deposited currency, and the check indorsed in blank, without instructions as to the check and received credit therefor. The check with other items was sent for "collection and credit" to B. Trust Company, and the check

was collected and credited on the day of its receipt by B. Company. After the close of banking hours on that day, C. Company closed its doors, but B. Company did not learn of that fact until the following morning. There had been extensive dealings between the two companies and C. Company had a checking account with B. Company, and was accustomed to send to it bills for collection and credit. During the day, B. Company credited the check, it paid or certified drafts drawn against the checking account of C. Company, and at the close of business the checking account was overdrawn. Held, that the payee of the check could not recover from B. Company because the relation of C. Company to the payee had changed to that of debtor and creditor. *King v. Bowling Green Trust Co.*, 145 App. Div. 398, 129 N. Y. S. 977.

64. *King v. Bowling Green Trust Co.*, 145 App. Div. 398, 129 N. Y. S. 977.

65. Trust companies must pay interest on deposits.—*Muth v. St. Louis Trust Co.*, 88 Mo. App. 596.

§ 315 (3f) Admissibility of Evidence.—On the issue as to the liability of a trust company to one to whom it has issued a certificate of deposit, evidence as to the dealings of the depositor with the company in relation to the deposit is admissible.⁶⁶

§ 315 (4) Loans and Discounts—§ 315 (4a) Power to Loan and Discount.—Generally the question as to whether a trust company is empowered to loan money or discount commercial paper is to be determined by an interpretation of its charter, or of the statute under which it is incorporated, or by which it is governed. The peculiar provisions of some of these acts have been interpreted by the courts.⁶⁷

§ 315 (4b) To Whom the Power Is Entrusted.—The question as to what officer or officers of a trust company are authorized to make loans or to discount commercial paper is generally determined by the by-laws of the company, which must be construed in the light of the statutes by which it is controlled and regulated.⁶⁸

66. Evidence admissible as to dealings between depositor and company in relation to deposit.—On the issue as to the liability of a trust company to plaintiff, C., on a certificate signed by the treasurer of the company, and reciting: "Received of C. bonds as follows (\$10,000): * * * [Reciting the bonds]. This certificate bears interest at 6 per cent from date"—it is competent to show a conversation between plaintiff and the treasurer, subsequent to the date of the certificate, in which plaintiff refused an offer by the treasurer, on behalf of the company, to take, as payment for the bonds, stock of the company, in which he said that they, or their equivalent in cash, with 6 per cent interest, would be returned to her any time she wished; also, a passbook issued to plaintiff, on which she was credited with \$150, which she testified was three months' interest on the certificate. *Callendar v. Kelly*, 190 Pa. 455, 42 Atl. 957.

67. Authority to lend money on land.—In 1873 the Freedman's Savings & Trust Company had authority, under its amended charter, to lend money on land. A deed made to it therefore conveyed title, and a subsequent purchaser under an execution against the grantor acquired simply the right to redeem on payment of the debt. *Kieth v. Catchings*, 64 Ga. 773.

Authority to discount notes.—Under the New York banking law of 1892, authorizing trust companies to receive deposits, and "to loan money on real or personal securities," to "purchase, invest in and sell stocks, bills of exchange, bonds and mortgages and other

securities," and to invest the moneys received by it in trust "in the stocks or bonds of any state, * * * or in such real or personal securities as it may deem proper," such a company may discount notes. *Binghamton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936.

No authority to discount commercial paper.—Authority to a loan and trust company under Laws 1870, c. 685, "to grant, bargain, sell, buy, or receive all kinds of property, or to hold the same in trust, or otherwise, * * * and to advance moneys, securities, and credits upon any property," does not confer banking powers, or authority to discount commercial paper. *New York State Loan, etc., Co. v. Helmer*, 77 N. Y. 64, affirming 12 Hun 35.

No power to loan or discount, commercial paper was given trust companies by Laws N. Y. 1893, c. 696, authorizing trust companies to exercise the powers conferred on individual banks and bankers by Laws N. Y. 1892, c. 689, § 55, which provides that such banks and bankers may "take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum; and such interest may be taken in advance." *Judgment* 163 N. Y. 320, 57 N. E. 408, affirmed. *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905.

68. The New York Banking Law (Laws 1892, p. 1909, c. 689), § 156, subd. 2, authorizes a trust company to loan money on real or personal securities. Under subdivision 11, added by Laws 1901, p. 1680, c. 660, it has all the pow-

§ 315 (4c) Loans and Discounts in Contravention of Statutory Prohibitions.—In some jurisdictions loans by a trust company to one of its directors is a matter of statutory regulation.⁶⁹ Though a trust company, under its charter, has authority to invest only in such securities as are thereby authorized, yet, if it has made an illegal loan, it may enforce repayment thereof.⁷⁰ Where the act incorporating a safe-deposit and savings institution does not authorize it to do a banking business, and the constitution and statutes forbid such corporations from carrying on such business, heavy penalties being fixed for doing so, notes discounted by the company are void.⁷¹ Where a safe deposit company is by statute prohibited from discounting notes or other commercial paper, and paper so discounted is declared to be void, the company can not enforce notes discounted by it, but it may recover the money loaned; and where a mortgage is given to secure a note so discounted it may be enforced.⁷² Under an act prohibiting

ers and privileges conferred on banks by §§ 55, 56, of the banking law, which powers and privileges were intended to place banks and private and individual bankers on an equality in certain particulars, including interest upon loans on, and discount of, notes, with the national banks. By § 156, subd. 9, it may invest in stocks, bonds, and other securities. Held, that, there being a manifest distinction between making investments and making loans and discounts, a by-law of a trust company providing that the executive committee may, in its discretion, authorize the president generally to make investments in such securities as are authorized by the charter of the company, and to dispose of such securities without previously consulting as to details with the committee, did not require all discounts of, and loans on, notes to be first submitted to the board or executive committee. *Kavanaugh v. Commonwealth Trust Co.*, 118 N. Y. S. 758, 64 Misc. Rep. 303.

69. Loan to corporation in which a director is interested.—A loan by a trust company to a corporation, in which one of the trust company's directors was largely interested, there being no proof that such director as an individual was interested in the loan, did not violate Banking Law (Laws 1892, p. 1910, c. 689), § 156, subd. 11, as added by Laws 1901, p. 1680, c. 660, forbidding a loan to a director, directly or indirectly, without the consent of the majority of the directors. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11; *S. C.*, 108 Minn. 527, 122 N. W. 12.

70. Repayment of illegal loan may be enforced.—*Davis Sewing-Mach. Co. v. Best* (N. Y.), 30 Hun 638.

71. Effect of statute forbidding cor-

poration to do a banking business.—*In re Jaycox*, Fed. Cas. No. 7,237, 12 Blatchf 209.

72. Effect of statutes prohibiting, discounting and declaring paper discounted void.—The charter of a safe-deposit and savings company authorized it to loan its capital and funds on certain specified securities, not including commercial paper, and the New York statute, 1 Rev. St., p. 712, §§ 3, 6, prohibited any corporation not authorized by law from discounting commercial paper, and made paper so discounted void. Held, that the company had no authority to discount commercial paper, and that a note discounted by it was void. *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

The provisions of the New York statute, 1 Rev. Stat., p. 600, § 4, forbidding any corporations not expressly incorporated for banking purposes to discount notes or other commercial paper, and of the restraining act declaring the securities void, applied to a safe-deposit company, and under them such a company was forbidden to engage in the business of discounting notes and other commercial paper, and could not enforce notes discounted in violation of the prohibition. But where a loan had been made by a company by way of a discount of a promissory note, the company or its assignees could recover the money loaned, although the security taken was void. And where one executed his bond and mortgage to a safe deposit company to secure it for indebtedness "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise," and the corporation lent such person money upon the discount of his notes, which recited that the maker had de-

a corporation, not expressly incorporated for banking purposes, from issuing evidences of debt upon loan, certificates issued by a trust company, stating that the amount designated had been deposited in the company, and that they were payable in twenty years, with interest, given for a loan, is void.⁷³

§ 315 (4d) Contracts for Loans Construed.—A loan company, which exacts from a corporation making application for a loan an advance payment of attorney's fees and a commission, promising to refund them if the loan is not made through the loan company's fault, is bound to return them on refusing the loan on the ground that the applicant is a corporation.⁷⁴

§ 315 (5) Purchases and Sales.—The power of trust companies to purchase and sell property is generally a matter of statutory regulation. In determining the power of such companies in this respect the peculiar provisions of some of the statutes have been construed by the courts.⁷⁵

posited the bond and mortgage as collateral, it was held that the company could enforce the mortgage. *Pratt v. Eaton*, 79 N. Y. 449, reversing 18 Hun 293.

73. Prohibition against issuing evidences of debt upon loan.—*New York Life Ins., etc., Co. v. Beebe*, 7 N. Y. 364, construing 1 Rev. St., p. 600, § 4.

74. Contract for loan construed.—The Foss Improvement Company made written application to the Midland Savings & Loan Company for a loan on real estate, and also to become a stockholder in the latter company. The application showed on its face that the Foss Improvement Company was a corporation. The Midland Savings & Loan Company exacted an advance payment of an attorney's fee and a sum equaling 1 per cent of the loan applied for as a prerequisite to its receiving or considering said application, but promised to refund same if the loan was not made through its fault. After receiving and considering the application, the Midland Savings & Loan Company refused to make the loan, on the grounds that the Foss Improvement Company, being a corporation, was ineligible to membership, and could not hold stock in the Midland Savings & Loan Company, and offered, as a counter proposition, to make the loan, provided the Foss Improvement Company would transfer its real estate to an individual, who would be qualified to hold stock and become a member of the Midland Savings & Loan Company. This the Foss Improvement Company declined to

do, and demanded the return of the fee and commission. Held, that the Midland Savings & Loan Company was bound to return the fee and commission; and that it would not be permitted to solicit business among those who were ineligible for membership, and then refuse to comply with the terms of its contract on the ground of the ineligibility of the applicant. *Midland Sav., etc., Co. v. Foss Imp. Co.*, 34 Okl. 564, 126 Pac. 720.

75. Securities that may be bought and sold under Missouri statute.—Under Rev. St. 1889, § 2839, subd. 9, trust companies are authorized to buy and sell all kinds of government, state, municipal, and other bonds, and all kinds of negotiable and non-negotiable paper, stocks, and other investment securities, which include bills of exchange. *Crow v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593.

No power to purchase commercial paper was given trust companies by N. Y. Laws 1893, chap. 696, authorizing trust companies to exercise the powers conferred on individual banks and bankers by N. Y. Laws 1892, chap. 689, § 55, which provides that such banks and bankers may "take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum; and such interest may be taken in advance." *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905.

Trust company not authorized to purchase its own stock.—Code Pub.

§ 315 (6) Investments for Customers.—Where an investment company accepts money for investment, the investor has a right to rely on a fair performance by it of the obligation assumed to invest or return the money, and the company can not discharge itself from that obligation by showing that the investor accepted from the company's officer a forged mortgage purporting to run directly from the borrower to him.⁷⁶

§ 315 (7) Contracts of Suretyship.—Ordinarily a loan company, organized to do a general brokerage business, to loan money, to negotiate bonds, etc., is not authorized to become a surety, as that act must generally be specifically authorized.⁷⁷

§ 315 (8) Guaranty of Securities.—The peculiar provisions of certain statutes, conferring powers upon trust companies, have been construed by the courts to determine whether such companies were authorized to become guarantors of certain securities.⁷⁸

Gen. Laws, art. 23, §§ 82-87, provide that, when it is desired to reduce the capital of a corporation, public notice shall be published for four weeks that a meeting will be held to determine whether the capital shall be diminished, that the owners of two-thirds of the stock must vote in favor of reduction, and that a certificate showing the reduction shall be filed. Acts 1892, p. 156, c. 109, § 851 relating to safe deposit trust and guaranty companies, provides that each stockholder shall be liable to depositors and creditors for double the par value of his stock. The Maryland Trust Company was granted a charter subject to the provisions of this act, and Const., art. 3, § 39, declares that the General Assembly shall grant no charter for banking purposes except on condition that the stockholders shall be liable to the amount of their shares for the debts. Held, that the Maryland Trust Company had no right to purchase its own stock. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70.

No authority to purchase controlling interest in stock of bank.—As the enumeration of powers in the statute excludes all others, a trust company which, under the Missouri statute, Rev. St. 1909, § 1124, cl. 9, is authorized to buy and sell government, state, municipal, and other bonds, and negotiable and nonnegotiable paper, stocks, and other investment securities, has no authority to purchase a controlling interest in the stock of another bank, for the purpose of operating and managing that bank. *Hadley v.*

Bankers' Trust Co. (Mo.), 138 S. W. 669.

76. Obligation of investment company to customer.—*Ring v. Long Island Real Estate, etc., Inv. Co.*, 93 App. Div. 442, 87 N. Y. S. 682, affirmed *Ring v. Howell*, 184 N. Y. 553, 76 N. E. 1107.

77. Loan company can not become a surety unless specifically authorized.—*Richeson v. National Bank*, 96 Ark. 594, 132 S. W. 913.

78. Power of company to become guarantor of bond made to it as trustee.—A trust company created under the New Jersey statute, P. L. 1899, p. 450, relating to trust companies, has, under § 6, power to become a guarantor or indemnitor of a bond made by a corporation to such trust company as trustee. *McCauley v. Ridgewood Trust Co.*, 81 N. J. L. (52 Vr.) 86, 79 Atl. 327.

Guaranty of promissory note ultra vires.—A guaranty by a loan and trust company, for a valuable consideration, of a promissory note given by one third party to another, and not negotiated by it, is ultra vires such a corporation organized under Comp. Laws Kan. 1885, p. 210, c. 23, for the purpose of transacting business of a loan and trust company and of buying and selling personal property, including commercial paper, with power to enter into "any obligation or contract essential to the transaction of its ordinary affairs," but forbidden to employ its property for any other purpose than to "accomplish the legitimate objects of its creation." Judgment 44 C. C. A. 456, 105 Fed. 224, affirmed *Ward*

§ 315 (9) Issuance of Notes.—Under a New York statute⁷⁹ notes issued by a loan and trust company are void, in the absence of an express charter power of issuance.⁸⁰

§ 315 (10) Dealings with Trust Funds Belonging to Separate Estates and Parties.—Where a trust company, having charge of several trust funds belonging to separate estates and parties, used in its private business part thereof, and its cash balance on hand is made up of money belonging to all the funds commingled, for the purpose of ascertaining how much money belonging to any particular fund it so used, only that fund's proportionate part of the cash on hand can be deducted from the cash balance due it.⁸¹

§ 315 (11) Trust Companies as Receivers.—Where a trust company is appointed a special receiver in any case, the capital of the company together with any deposit required to be made with any officer of the state, whether the deposit be a part of the capital or not, is to be taken and considered as the security required by law for the faithful performance of the duties of the trust company as receiver.⁸²

§ 316. Forfeiture of Franchise and Dissolution.—A statute authorizing the state banking board to revoke a certificate given to an installment investment company if grounds provided by statute for such revocation exist, is not unconstitutional as giving the state banking board arbitrary powers.⁸³ Though the charter of a trust company provides that, in case of the dissolution of the company, deposits in favor of minors, insane persons, or married women shall be preferred claims, and the company becomes insolvent in the sense of inability to meet its obligations in due course of business, and a receiver is appointed, and an injunction issued restraining the company and its officers from transacting further business or interfering with property, yet if the company is not insolvent in fact, and does not lose its power to resume business, there is not such a dissolution as entitles the deposits of minors, insane persons, and married women to be preferred.⁸⁴ Commissioners of a trust company, appointed in pursuance of statute to close up the company's business, and invested with the legal title to all of the company's property for the purpose of the statute, may maintain a suit in their own names to foreclose a mortgage to the company.⁸⁵

v. Joslin, 186 U. S. 142, 46 L. Ed. 1093, 22 S. Ct. 807.

79. 1 Rev. St., p. 600, § 4, and p. 712, §§ 3, 5.

80. Notes issued void in absence of charter power—New York statute construed.—New York State Loan, etc., Co. *v. Helmer*, 77 N. Y. 64, affirming 12 Hun 35.

81. Dealings with trust funds belonging to separate estates and parties.—St. Paul Trust Co. *v. Kittson*, 62 Minn. 408, 65 N. W. 74.

82. What funds are security for performance of duties as receiver.—Goff *v. Goff*, 54 W. Va. 364, 46 S. E. 177.

83. Statute authorizing banking board to revoke certificates given investment company, constitutional.—State *v. Northwestern Trust Co.*, 72 Neb. 497, 101 N. W. 14, so holding as to Laws 1903, p. 275, c. 29, § 9.

84. When preference will be allowed.—Dewey *v. St. Albans Trust Co.*, 56 Vt. 476, 48 Am. Rep. 803.

85. Commissioners to close business

§ 317. Insolvency and Receivers—§ 317 (1) Collection of Assets.—Where a receiver has been appointed to administer the estate of an insolvent loan company it is his duty to collect securities deposited by the company with a trustee to secure its debentures.⁸⁶ The assignees of an insolvent safe-deposit company have power to sue for and recover assets of the corporation which it has improperly disposed of.⁸⁷

§ 317 (2) When Receiver Is Entitled to Receive Fund Deposited with State Treasurer.—Under a Texas statute,⁸⁸ on the failure of any investment company required to deposit with the state treasury cash or securities, and the appointment of a receiver, the receiver is required to use such deposit in liquidating the debts of the company. But the court after appointing the receiver is not authorized to compel the controller to issue a warrant in his favor on the treasurer for the money and securities deposited, before the adjudication of any debt against the company.⁸⁹

§ 317 (3) Receiver's Sales.—What Funds Pass by Sale.—Where, at the time an investment company became insolvent, it held a fund as trustee, such fund will not pass by the receiver's sale of the company's assets, though the sale was made under an order of court providing that persons claiming an interest in the assets should present their claims or be barred, and the cestui que trust filed no claim.⁹⁰

§ 317 (4) Distribution and Application of Assets—§ 317 (4a) What Law Governs Distribution.—Under statutes which provide that the law applying to insolvent banking associations shall regulate proceedings against insolvent trust companies and the final distribution of their assets, and that the words "trust company" shall be construed to include "savings bank" and "trust company," the assets of an insolvent savings bank and trust company must be distributed under the statute, directing the manner

may sue in their own names to foreclose mortgage.—*Creswell v. Williams*, 2 MacArthur (9 D. C.) 246, construing Act of Congress of June 20, 1874.

86. Receiver's duty to collect securities deposited with trustee—Trust agreement construed.—A trust agreement under which a loan company deposited securities with the trustee to secure its debentures provided that in case of default in payment of any debenture bond or interest thereon the trustee should proceed to collect or sell the securities pledged, and to apply the proceeds in payment of the debentures, and that any claim of the trustee for the costs of such collection or sale should not be a lien upon the securities, but should be against the loan company only. Held, that such agreement did not contemplate the general insolvency of the loan com-

pany, and that while, therefore, the trustee could not be compelled in such contingency to collect the securities at its own cost, neither was it authorized thereby to make such collection where a receiver had been appointed to administer the estate of the insolvent. *Girard Trust Co. v. McKinley-Lanning Loan, etc., Co.*, 135 Fed. 180.

87. Assignees may recover assets improperly disposed of.—*Pratt v. Short* (N. Y.), 53 How. Prac. 506, affirmed in 79 N. Y. 437, 35 Am. Rep. 531.

88. Laws 1897, p. 118, c. 94 (1 Sayles' Ann. Civ. St. 1897, arts. 749f-749i).

89. When receiver is entitled to receive fund deposited with state treasurer.—*Ex parte Stephens*, 100 Tex. 107, 94 S. W. 327.

90. Receiver's sale will not pass a trust fund.—*New York Security, etc., Co. v. Lombard Inv. Co.*, 75 Fed. 172.

of distribution of the assets of insolvent banking associations.⁹¹

§ 317 (4b) What Claims Will Be Allowed.—In some jurisdictions there are statutes governing the question of what claims shall be allowed by the receivers of an insolvent investment company. The provisions of the Missouri statute have received judicial interpretation.⁹²

§ 317 (4c) Order of Payment—Preferences and Secured Claims—§ 317 (4ca) Trust Companies—§ 317 (4caa) Where Company Held Property as Trustee or in a Fiduciary Capacity.—If there is property in the possession of the assignee of an insolvent trust company that was held in trust by the company, the cestuis que trustent are entitled to their interest in it notwithstanding the assignment.⁹³ Nor does it matter what or how many changes were made by the company in the investment of the trust property, or whether the changes were authorized or unauthorized, provided the identity of the property is preserved.⁹⁴ The same principle applies and causes the same result, if the company, instead of being trustee of the fund, held it as agent, or in a fiduciary capacity.⁹⁵ But the beneficial owner must trace his money or property into some specific property in the possession of the assignee to entitle himself to a preference over general creditors.⁹⁶ When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the equitable right of the cestui que trust to

91. What law governs distribution of assets.—*Mann v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 346, 45 Atl. 229, construing V. S. §§ 4063, 4106, 4123.

92. What claims allowed—Missouri statute construed.—Receivers were appointed for an insolvent investment company, incorporated under the laws of Missouri, whose liabilities consisted mainly of guaranties, in various forms, indorsed on bonds, secured by real estate mortgages, executed by borrowers to the company, and subsequently sold and transferred by it to investors with guaranties mentioned. Held, that the rights of such investors were governed by the state statute relating to assignments for benefit of creditors, which provides that the assignment shall be "for all the creditors of the assignor in proportion of their respective claims" (Rev. St. Mo. 1889, § 424); that, in the distribution of the property of such company, all claims should be allowed which, at the time of the appointment of receivers, (1) furnished a present cause of action against the guarantor, or (2) constituted direct obligations on its part, whether due or to become due, or (3) which, though not then ma-

tured, or not constituting direct obligations, thereafter matured or would mature, or become direct obligations, before an order of distribution was made; and that all claims should be rejected (1) which arose on guaranties of collection, as distinguished from guaranties of payment, where no proceedings had been taken by the holder to collect from the maker or from the mortgaged premises, or (2) which were not matured, and in respect to which there had been no default of interest, or (3) in which, by agreement between the holder and the maker, without the assent of the guarantor, the time of payment of the principal obligation had been extended. *New York Security, etc., Co. v. Lombard Inv. Co.*, 73 Fed. 537.

93. Where company held property as trustee or in fiduciary capacity—Doctrine stated.—*Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

94. *Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

95. *Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

96. *Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

follow it fails.⁹⁷ But if the money is mixed with other money, and deposited in a bank, loaned upon a promissory note, or invested in other securities or property, which came into the possession of the assignee, the claimant will have a charge upon the money, deposit, note, securities, or property, and in that way gain a preference over ordinary creditors.⁹⁸ A claimant who seeks a preference by reason of a trust is called upon to prove the existence of the trust. In the absence of testimony on the point, there is no presumption that a trust exists. Proving that there was a trust at one time in particular property does not prove that the trust is impressed upon other property at a later time, without showing that the latter is the proceeds or substitute of the former.⁹⁹

97. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113; *In re Cobson*, 3 Pa. Super. Ct. 244.

98. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

99. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

Doctrine illustrated.—Where money received by a trust company as trustee is not kept distinct or invested in any specific way, but is mingled with the general mass of money on deposit, and used in the general banking business, and there is no means of tracing or ascertaining its identity in any form or species of property, the cestui que trust is not entitled to a preference over general creditors in a distribution of the funds in the hands of the assignees of such trust company. *In re Cobson*, 3 Pa. Super. Ct. 244.

Defendant trust company loaned money to a party, who gave a note secured by mortgage on certain land therefor, before such company's insolvency, which note and mortgage, assigned in blank, defendant sold and delivered to claimant, the assignment never being recorded. Subsequently defendant obtained the mortgagor's equity, and sold part of the land to other parties, releasing claimant's mortgage thereon without his authority or knowledge. Held, that no trust was created entitling claimant to a preference to other creditors in such company's assets. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

Defendant trust company contracted to sell certain land before insolvency, taking notes therefor, and agreeing to convey free of incumbrances on payment. Two of the notes were sold to claimants before maturity, and, on discovery that there was an outstanding mortgage on the land, claimants purchased same at time of the appoint-

ment of an assignee for defendant. The vendees stand ready to pay according to contract. Held, that claimant's were entitled to the entire balance due defendant on purchase price in payment of their notes as against other creditors of defendant, since their money is traceable to such interest. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

Defendant trust company sent claimants' certificates of deposit in payment of the proceeds of notes secured by the mortgage of land, collected by it without the claimants' authority, and then in claimants' possession, before insolvency, and also sent notes with the certificates to be held as collateral security, which certificates and collateral notes claimants retained. Held that claimants were entitled to the benefit of such certificates and notes as against the assignee of such company in insolvency, since they ratified defendant's acts in making collections, and accepted the certificates and notes in payment. *Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

Defendant trust company sold and delivered a certain note, payable to it or order, with interest according to attached coupons, and secured by mortgage on certain land, to claimant, before insolvency; the assignment being in blank and unrecorded. By the terms of the note, principal and accrued interest became due and payable on nonpayment of interest after a certain period, at the election of payees or assigns. Defendant guaranteed payment of principal and interest, and reserved the right to purchase the note at any time. The maker did not pay the coupons when due, but defendant advanced claimant sums represented by those due at a certain date, and took them up and held them. Claimant was never told of the maker's de-

Property Deposited by Company as Trustee in Its Savings Department.—See post, "As between Depositors," § 317 (4cab).

§ 317 (4cab) As between Depositors.—Where a trust company appointed trustee of a fund deposits such fund in its savings department under authority of a statute requiring trust companies or banks receiving savings deposits to organize a separate department for such purpose, the claimant of such fund is not entitled to a preference over other depositors in the savings department on the company's insolvency, since all funds therein are trust funds.¹

§ 317 (4cac) As between Depositors and Creditors.—In the absence of legislation preferring depositors over other general creditors, no such preference exists on insolvency.² Statutes giving a preference on insolvency of a bank of issue, or of deposit and discount, to depositors, do not embrace a trust company expressly denied the right to engage in banking.³ A statute giving a preference to depositors in a trust company does not apply to an assignment for the benefit of creditors executed prior to the approval of the act.⁴

§ 317 (4cad) As between Savings Depositors, Holders of Debenture Bonds and Unsecured Creditors.—Under a statute which provides that a trust company, transacting the business of a savings bank, shall conduct the business as a separate department, and be amenable to the laws governing savings banks, where a trust company authorized to do a general banking and savings bank business fails, and its assets consist of securities held for the benefit of depositors in the savings department, securities deposited with trustees to secure the payment of debenture bonds, and unpledged assets, the relation between the different classes of claimants of

fault. At the time of sale defendant represented that certain liens on the land would be paid from money received from claimant, making the latter's mortgage a first lien. One of the liens was not paid, and defendant discharged claimant's mortgage, and gave a new mortgage to the holder of such lien for the amount due, without her knowledge or consent. Defendant subsequently acquired title to the equity in the land. Held, that claimant was not entitled to be paid the balance due on her note from defendant's assets in preference to unsecured creditors, since she took the risk of performance of the promise to pay prior to liens. *Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113.

1. **Claimant of fund deposited by company as trustee not entitled to preference.**—*Tucker v. New Hampshire*

Trust Co., 69 N. H. 187, 44 Atl. 927, construing Laws 1887, ch. 169; Laws 1891, ch. 23; *Bank Comm'rs v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113, construing Laws 1889, ch. 175, § 1.

2. **Depositors not preferred in absence of statute.**—In *re Prudential Trust Co.'s Assignment*, 223 Pa. 409, 72 Atl. 798.

3. **Trust company not embraced by statutes giving preferences to depositors in banks.**—In *re Prudential Trust Co.'s Assignment*, 223 Pa. 409, 72 Atl. 798, construing Act April 26, 1844 (P. L. 419), Act April 16, 1850 (P. L. 477), and Act May 13, 1876 (P. L. 161).

4. **Statute preferring depositors not applicable to assignment executed prior to approval of act.**—In *re Prudential Trust Co.'s Assignment*, 223 Pa. 409, 72 Atl. 798, construing Act May 8, 1907 (P. L. 192).

the funds in the hands of the assignee and the trust company is that of debtor and creditor, and the depositors in the savings department as well as the holders of debenture bonds are entitled to share with the unsecured creditors in the distribution of the unpledged assets as to so much of their claims as are not satisfied out of the special funds created for their benefit.⁵

§ 317 (4cae) Amount Recoverable by Secured Depositors and Creditors.—Under the New Hampshire statutes relating to the winding up of the affairs of insolvent trust companies, secured depositors and creditors are allowed to prove only the balance of their claim above the value of their securities.⁶

§ 317 (4caf) Rights of Receiver upon Whose Bond Company Is a Surety.—Where a receiver deposits the money of his estate with a trust company, which is a surety on his bond, under an agreement that the money shall bear interest and be subject to check with the counter signature of the trust company, and such moneys are mingled with the general funds of the company, which becomes insolvent, the receiver can not claim that he is entitled to have returned to him the whole of the balance of his account under a rule of court providing that all corporations approved as security shall keep all moneys received by them from the persons for whom they become sureties separate from all other funds and in a separate account.⁷

§ 317 (4cb) Investment and Loan Companies.—The creditors of an insolvent investment company must be paid in full, before the stockholders are entitled to distribute anything among themselves as dividends.⁸ Where a mutual investment and loan association, engaged in collecting money in small monthly installments from its members residing in various states, and investing the same for their joint benefit, becomes insolvent, a contract is to be implied among its members that all its assets, after payment of debts due nonmembers, shall be divided ratably among them according to their

5. Preferences as between savings depositors, holders of debenture bonds and unsecured creditors.—*Bank Comm'r's v. Security Trust Co.*, 75 N. H. 107, 71 Atl. 377, construing Pub. St. 1901, c. 165, § 18.

6. Amount recoverable by secured depositors and creditors under New Hampshire Statutes.—*Bank Comm'r's v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113, construing Pub. St. c. 162, §§ 12-25, c. 192, §§ 11, 12, c. 201, § 20.

7. Rights of receiver upon whose bond company is a surety.—*Pennsylvania Mut. Life Ins. Co. v. City Trust, etc., Co.*, 218 Pa. 50, 66 Atl. 995.

8. Claims of creditors preferred to those of stockholders.—*Taylor v. Commonwealth*, 119 Ky. 731, 25 Ky. L. Rep. 374, 75 S. W. 244.

By-laws not authorizing funds to be distributed as dividends, as against creditors.—Where an investment company's by-laws provided that a surplus fund, consisting of 5 per cent of the weekly collections or dues, should be used or invested as the directors might elect for the best interest of the company, and an expense fund, consisting of 10 per cent of the weekly collections and dues and transfer fees, should be used for current and such other expenses as the directors might direct, such by-laws did not authorize the directors of the corporation, while insolvent, to distribute dividends from such funds as against creditors of the corporation. *Taylor v. Commonwealth*, 119 Ky. 731, 25 Ky. L. Rep. 374, 75 S. W. 244.

several contributions to the common fund, without reference to their place of residence.⁹ Where a trust company places a fund in trust as collateral security for the faithful keeping and performance by the corporation of its guaranties, and at the time the corporation is engaged only in guarantying and selling personal or corporate obligations, and it afterwards enters into the business of selling debenture bonds, for the security of which it creates other trust funds under other trust indentures, the trust fund first created is liable for the first class of obligations in preference to the claims of any other class.¹⁰

§ 317 (4d) Money Received by Trust Company When Insolvent to the Knowledge of Its Officers.—A bank which, at the request of and as an accommodation to a trust company, lets it have money in exchange for its check on a third bank for like amount, when it is insolvent to the knowledge of its officers, and on the last day its doors are opened, can, the check when presented in regular course of business being dishonored because of the assignment of the trust company, recover of the assignees the money, identified by remaining in the package in which it was received.¹¹

§ 317 (4e) Application of Funds Collected in One State by Receiver Appointed in Another.—Where receivers have been appointed in different states for property of a loan and investment association, and the receiver first appointed applies to a court in another state to have the funds there collected turned over to him for pro rata distribution among all members, regardless of state lines, it will be presumed that the court appointing him will apply the funds in that manner, and no pledge to that effect will be required as a condition of turning them over.¹²

§ 317 (5) Interest.—Where a trust company is declared insolvent and a receiver appointed, and the assets afterwards prove sufficient to pay all the creditors in full, they are entitled to interest upon balances due, as against the corporation and its stockholders.¹³ But no interest is allowed after the appointment of the receiver, as between preferred and unpreferred creditors.¹⁴ Holders of certificates of deposit, issued by an insolvent trust

9. Contract implied among members of mutual investment and loan association.—*Smith v. Taggart*, 30 C. C. A. 563, 87 Fed. 94.

10. Trust fund created to secure a certain class of obligations.—*American Loan, etc., Co. v. Northwestern, etc., Loan Co.*, 166 Mass. 337, 44 N. E. 340.

11. Money received by trust company when insolvent to the knowledge of its officers.—*Corn Exch. Nat. Bank v. Solicitors' Loan, etc., Co.*, 188 Pa. 330, 41 Atl. 536, 68 Am. St. Rep. 872.

12. Application of funds collected in one state by receiver appointed in

another.—*Smith v. Taggart*, 30 C. C. A. 563, 87 Fed. 94.

13. Creditors entitled to interest as against corporation and stockholders.—*People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, affirmed in 187 N. Y. 293, 79 N. E. 1004; *People v. American Loan, etc., Co.*, 172 N. Y. 371, 65 N. E. 200, affirming 70 App. Div. 579, 75 N. Y. S. 563, which modified 36 Misc. Rep. 355, 73 N. Y. S. 584.

14. No interest allowed as between preferred and unpreferred creditors.—*People v. American Loan, etc., Co.*, 172 N. Y. 371, 65 N. E. 200, affirming

company, are entitled to interest specified in their certificates, from the day of the last payment of interest thereon up to and including the day on which the receiver is appointed, and thereafter upon the respective credit balances due to them, up to the day of the final payment of the principal, at the legal rate.¹⁵ Depositors having no interest contracts are entitled to interest at the legal rate upon the amount of their respective credit balances, from the date of the appointment of the receiver up to the date of the final payment of the principal.¹⁶ A depositor is entitled to payment of interest after dissolution only upon the balances which would have been due to him had he accepted the several installments of principal at the time they were respectively paid to creditors by the receivers.¹⁷ The appointment of temporary receivers for a trust company and the assumption of possession by the state obviates the necessity of any formal demand on the part of depositors for the payment of their deposits, so as to entitle them to interest.¹⁸

§ 317 (6) Expenses of Administration and Compensation of Receivers.—Securities set apart for the benefit of depositors in the savings department of an insolvent trust company doing a banking business must bear the expense incident to administering them, and the same is true of securities deposited for the benefit of holders of debenture bonds issued by the company.¹⁹ The amount of compensation to be allowed the receivers

70 App. Div. 579, 75 N. Y. S. 563, which modified 36 Misc. Rep. 355, 73 N. Y. S. 584.

The charter of an insolvent trust company (Laws 1872, c. 868; Laws 1884, c. 260, § 3), provided that on dissolution of the company the debts due by it as trustee, receiver, or depository of savings banks and certain other funds, should have a preference. The general banking law (Laws 1892, c. 689, § 130) has a similar provision. Held, that such preferences took effect on the appointment of the receiver, but payment of interest from the date of the appointment of the receiver to preferred creditors on their claims would not be allowed where such payment would exhaust the funds in the hands of the receiver, and leave nothing for the unpreferred creditors. Order, 70 App. Div. 579, 75 N. Y. S. 563, modifying 36 Misc. Rep. 355, 73 N. Y. S. 584, affirmed. *People v. American Loan, etc., Co.*, 172 N. Y. 371, 65 N. E. 200.

15. Amount of interest.—*People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, order affirmed in 187 N. Y. 293, 79 N. E. 1004.

At the time of a dissolution of a trust company and the appointment of a receiver, there were outstanding certified checks upon the issuance of

which the account of the depositor was debited, and interest thereafter was only allowed him on the books of the company on the balance standing to his credit after the amount of the check had been deducted therefrom. Held, that holders of such checks are entitled to interest upon the amount of their credit balances from the date of the appointment of the receiver up to the date of the final payment of principal, at the legal rate. *People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, order affirmed in 187 N. Y. 293, 79 N. E. 1004.

16. *People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, order affirmed in 187 N. Y. 293, 79 N. E. 1004.

17. *People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, order affirmed in 187 N. Y. 293, 79 N. E. 1004.

18. When necessity of formal demand for payment of deposits is obviated.—*People v. Merchants' Trust Co.*, 116 App. Div. 41, 101 N. Y. S. 255, order affirmed in 187 N. Y. 293, 79 N. E. 1004.

19. From what funds expenses of administration are paid.—*Bank Comm'rs v. Security Trust Co.*, 75 N. H. 107, 71 Atl. 377.

of a trust company and their counsel rests within the discretion of the court.²⁰ It is not necessary to institute a separate proceeding for an allowance of compensation and expenses of temporary receivers of a trust company in insolvency proceedings; the proper practice being to settle such claims in the proceeding by the receivers for the settlement of their accounts and to direct payment thereof out of the assets before they are turned over to the persons entitled thereto.²¹

§ 317 (7) Actions—§ 317 (7a) Right to Sue.—A suit by debenture holders against an insolvent debenture company, which has ceased to do business, except to collect all existing debentures, praying for the appointment of a receiver, a settlement of the affairs of the company, together with a payment to the holders of the amounts paid by them less the amounts received from matured coupons, and for a decree to prevent an officer of the company from obtaining possession of the guaranty fund of the company, may be maintained, though the debentures are not matured.²²

Action by Superintendent of Banks on Securities Given to a Delinquent Trust Company.—Under statutes authorizing the superintendent of banks to sue in the name of a delinquent corporation for debts due such corporation, the superintendent has no legal capacity to bring an action in his own name against a surety company on a bond and mortgage given to a delinquent trust company.²³

§ 317 (7b) Jurisdiction.—A state statute creating a state banking department, and providing for winding up corporations doing a banking business in the state courts at suit of the attorney general in case of insolvency or interest of the public, does not impair the federal court's jurisdiction of a suit by nonresident creditors of a trust company of the state doing a banking business and unable to pay its debts as they mature, for liquidation of its assets and an application thereof to its debts through a

20. Compensation allowed to receivers and their counsel held excessive.—Insolvency proceedings having been instituted against a trust company, three persons were appointed temporary receivers October 25, 1907. They were never made permanent, but after serving five months were discharged, and an order granted directing them to turn over the assets to the trust company, which was permitted to resume business. Held, that an allowance of \$75,000 to each of the receivers for his compensation and the same sum to their counsel, amounting in all to \$300,000, was excessive, and should be reduced to \$20,000 to each receiver and \$20,000 to the counsel. *People v. Knickerbocker*

Trust Co., 127 App. Div. 215, 217, 111 N. Y. S. 2.

21. Not necessary to institute separate proceeding for allowance of compensation and expenses.—*People v. Knickerbocker Trust Co.*, 127 App. Div. 215, 217, 111 N. Y. S. 2.

22. Suit by debenture holders.—*Christian v. Michigan Debenture Co.*, 134 Mich. 171, 96 N. W. 22.

23. Action by superintendent of banks on securities given to a delinquent trust company.—*Van Tuyl v. New York, etc., Security Co.*, 153 App. Div. 409, 138 N. Y. S. 541, construing Banking Law (Consol. Laws 1909, ch. 2), § 19, as amended by Laws 1910, ch. 452.

receiver.²⁴ But where, pending such a suit in the federal court, the attorney general obtains a decree dissolving the company and appointing a receiver, which is unappealed from, all purposes for which the federal court's jurisdiction was invoked having been subserved on payment in full of all of its debts, the federal court can not then return a surplus in the hands of its receiver either to the corporation or its stockholders, but is bound to turn it over to the receiver appointed in the dissolution proceedings in the state court for distribution.²⁵

§ 317 (7c) Intervention.—Where a trust company holding securities of a loan company in trust to secure its debentures petitions the court in insolvency proceedings against the loan company asking an order permitting it to collect or sell the securities in its hands, and that its costs and expenses be made a charge against the fund realized, debenture holders, who deny its right, under the trust agreement, to so charge the costs and expenses, are entitled to intervene and contest such application.²⁶

§ 317 (7d) Evidence—Sufficiency.—For evidence held sufficient to show fraud on the part of a debenture company and its officers in the sale of debentures, see the appended note.²⁷

§ 317 (7e) Defenses.—In a suit by the receiver of an insolvent trust and banking company to foreclose a mortgage given by a party as a substitute for an original subscriber in payment of his stock subscription, the defendant can not defend on the ground that the company had no authority to receive securities, or anything but money, in payment for its stock.²⁸

24. Jurisdiction of federal and state courts.—*Lyon v. McKeefrey*, 96 C. C. A. 340, 171 Fed. 384, so holding as to Pennsylvania statute, Act Feb. 11, 1895 (P. L. 4), §§ 6, 9.

25. *Lyon v. McKeefrey*, 96 C. C. A. 340, 171 Fed. 384.

26. Intervention.—*Girard Trust Co., v. McKinley-Lanning Loan, etc., Co.*, 135 Fed. 180.

27. Evidence sufficient to show fraud in sale of debentures.—A debenture company organized under the laws of West Virginia transferred its office to Michigan. Its business was the sale of debentures. Its authorized capital was \$250,000. Only a very small part of the capital stock was paid in. It deposited in a bank \$50,000 as a guaranty fund under a secret agreement between the officer of the company furnishing the money and the com-

pany by which the former agreed to guaranty a credit of \$50,000 to the company. The guaranty fund was held out to investors and others as part of the funds of the company. The officer furnishing the money knew of this. The company advertised that several prominent business men had invested when in fact the officer of the company had taken out the debentures, paying therefor, and receiving all redemptions thereon. The federal government determined that it was a lottery scheme. Held sufficient to show fraud on the part of the company and its officers in the sale of debentures. *Christian v. Michigan Debenture Co.*, 134 Mich. 171, 96 N. W. 22.

28. Insufficient defense to action to foreclose mortgage given in payment of stock subscription.—*Leavitt v. Pell* (N. Y.), 27 Barb. 322.

CHAPTER XVIII.

VII. CLEARING HOUSES.

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§ 323 (1) When Action upon an Account Stated Will Not Lie.

§ 323 (2) Parties.

§ 323 (3) Pleading.

§ 323 (4) Evidence.

§ 323 (5) Laches as a Defense.

VII. CLEARING HOUSES.

§ 318. **Nature and Status.**—Clearing house associations are voluntary organizations created by the co-operation of banks doing business in one locality, to afford a uniform and convenient method of obtaining daily settlements of balances between the banks forming the association, and also, if desired, to issue clearing house certificates secured by pledge of collateral,

available as cash in times of financial stringency and panic.¹ They are agents, for limited purposes, of the banks composing them.² Though occasionally issuing certificates which pass as currency, a clearing house is not a mutual bank, organized and operated by the associated banks.³

§ 320. Settlements and Transactions through Clearing House—
§ 320 (1) When Practice of Collecting Checks through Clearing House Is a General Custom.—Where the practice of collecting checks through the clearing house prevailed only among banks making their exchanges through such house, but not among other banks, savings banks, or trust companies, or with respect to checks on private bankers, the practice is not a general custom.⁴

§ 320 (2) Payment through Clearing House.—Payment through a clearing house amounts merely to a system of set-offs and cancellations, whereby accounts are settled between members without the actual transfer of unnecessary funds.⁵ A national bank, which is the clearing bank in a clearing house association for a state bank, on which its depositor has drawn

1. Clearing-house associations defined.—*Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835; *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. 289; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533, 26 S. Ct. 294.

The clearing-house association of Philadelphia is a voluntary organization, created by the co-operation of national banks doing business in that city. Its affairs are governed by rules and regulations adopted by agreement between the banks forming the association, and the general direction of its operation is under the control of a president, secretary and manager, and of a committee selected by the members of the association. *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835.

2. Agency for component banks.—*Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. 289; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533, 26 S. Ct. 294.

The clearing-house association of Columbus, Ohio, was an agent, for a limited purpose, of the banks composing the association, that is, its duty was to clear or balance daily the claims of the respective banks, one against the other, resulting from the checks drawn upon and held by the different members. The only source from which the association derived the means to carry on its operations was from assessments upon the members, which were made solely for the pur-

pose of paying rents, salaries, and similar expenditures. To effect the clearings each member of the association, on banking days, sent to the clearing house, at a specified hour, the checks held by it against the other banks. The checks sent by each member were considered as remaining the property of the member, the association being simply an agent for collection. Where a bank was entitled to a credit or payment corresponding to the excess which the sum of the checks presented by it exceeded the sum of the checks against it, the clearing house paid that bank the difference by drawing its check upon one or more of the debtor banks; and each member constituted the manager of the association its agent to draw a check or checks upon such member for any balance found to be due by that member. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. 289, followed in *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533, 26 S. Ct. 294.

3. Not a mutual bank.—*Crane v. Fourth St. Nat. Bank*, 173 Pa. 566, 34 Atl. 296.

4. When practice of collecting checks through clearing house is a general custom.—*First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412.

5. Payment through clearing house defined.—*Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

checks in the ordinary course of business and in good faith, may recognize the checks drawn on the day the superintendent of banks took possession of the state bank, and may pay the checks.⁶ Where forged checks, payable to cash and unindorsed, are paid by a bank through the clearing house to another bank, which has credited a depositor therefor, the bank paying can not recover the amount of the checks, since it should know the genuineness of the signature of the maker, and the payee in no way deceived it.⁷ Where a bank in one city, being indebted to a bank in another city for collections made, remits by its cashier's check on another bank in the latter city with which it has a sufficient deposit, which check is duly presented and paid through the clearing house, the transaction constitutes a complete appropriation of the fund to the creditor bank, and its ownership is not affected by its restoring the money to the bank paying the check on the same day, on the demand of the latter, made on learning of the suspension of the drawer, which return is required under such circumstances by the rules of the clearing house, of which both banks are members, but only for the purpose of protecting the paying bank, in case the payment should prove to have been unauthorized; nor will the fact that such bank, without right, pays the money to the receiver of the insolvent bank, prevent its recovery from the receiver by the payee of the check.⁸

§ 320 (3) Contract by Bank to Pay Checks on Another Bank Presented through Clearing House.—A contract by a bank to pay the checks on another bank presented through the clearing house does not impose on such bank the same liability in regard to such checks as attaches to the bank on which they are drawn.⁹

§ 320 (4) Effect of Indorsements on Checks Passing through Clearing House.—Where a bank, the holder of a check, stamps upon it words intended as a transfer of it to another bank that has guaranteed its payment, and the latter bank receives it through the clearing house and pays it, it is entitled, the drawee being insolvent, to recover the amount thereof from the drawer.¹⁰ It is competent for banks associated in a clearing house

6. **Payment of checks proper.**—*People v. Bank*, 70 Misc. Rep. 633, 127 N. Y. 908.

7. **When bank paying forged checks can not recover.**—*Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286.

Where forged checks, payable to cash, were deposited with defendant bank, and paid to it through the clearing house by plaintiff bank, the drawee, the fact that defendant had not required endorsement of the checks would not render it liable to refund the money received, on the ground that such fact led plaintiff to believe that the checks had been cashed for their

apparent maker, since there was no custom for such requirement nor any duty of defendant to anticipate such result. *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286.

8. **Effect of payment of check through clearing house and restoration of money paid.**—*National Union Bank v. Earle*, 93 Fed. 330.

9. **Contract by bank to pay checks on another bank presented through clearing house.**—*Grant v. McNutt*, 12 Misc. Rep. 20, 33 N. Y. S. 62, 66 N. Y. St. Rep. 719.

10. **Effect of indorsement on check.**—Defendant drew a check on the bank-

arrangement to make rules governing, as between them, the effect of indorsements of negotiable paper, and such rules supplant the law on the subject,¹¹ and where a bank presents a check to a clearing house so indorsed that under the rules it is not liable as general indorser, the mere presentation does not render it liable as on general indorsement.¹²

§ 320 (5) Presumption of Good Faith in Bank in Taking up Check.—A bank on which a check is drawn, and which is indorsed in blank in the name of the payee, on taking it up in the clearing house, is presumed to have acted in good faith.¹³

§ 320 (6) Rule That Errors in Exchanges Shall Be Adjusted by Banks Concerned.—The rule of a clearing house that "errors in exchanges shall be adjusted by the banks concerned," applies only to ascertaining that accounts are not overdrawn.¹⁴

ing house of H. S. & Co., and delivered it, after it was certified by the drawee, to the M. bank in payment of a note. Plaintiff, a member of the clearing house, had guarantied to the M. bank payment of all certified checks drawn on H. S. & Co. which came into its hands. The M. bank stamped on the check, "Paid through the C. clearing house, June 3, 1893, to the M. bank;" and, through the clearing of that day, the check came into plaintiff's hands, and was paid. H. S. & Co., failed, and did not open their bank on June 3d. Held, that the stamp placed on the check by the M. bank was a transfer of the check to plaintiff, and entitled it to recover the amount thereof from the drawer. *Zinner v. National Bank*, 54 Ill. App. 602.

11. Right to make rules governing effect of indorsements.—*Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

The constitution and rules of a clearing house provided that negotiable paper payable to a bank's order, deposited for clearance, should be indorsed by the original payee, but negotiable paper deposited for clearance by a member should bear its stamp, "For clearing house purposes only," and should guaranty validity and regularity of indorsements, and every bank should file with members a certified impression of its stamp. Held, that where a "raised" check payable to an individual was deposited by a bank stamped, "Pay through clearing house," it conveyed no representations to the drawee that the depositor claimed to be the owner; and in an action by the drawee to recover from the other bank, it could show that it

acted merely as collecting agent for the payee. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

12. Effect of presentation of check to clearing house.—*Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

Transaction not amounting to a sale with warranty—Statutes construed.—Civ. Code, § 1764, provides that a mere contract of sale does not imply warranty; and § 1774 declares that the seller of an instrument purporting to bind one to the performance of an act thereby warrants no knowledge of any fact tending to prove it worthless or its invalidity for any cause. Held, that where a bank presented to a clearing house a check drawn on another bank, indorsed by the bank presenting it, in a restricted manner, which under the rules of the clearing house did not amount to a guaranty of the genuineness of the instrument, the presentation and payment by the drawee did not amount to a sale with warranty, since the only warranties on a sale are those fixed by the Code, amounting to a mere warranty against knowledge of defects. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169.

13. Presumption of good faith by bank in taking up check.—*Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. 873.

14. Rule that errors in exchanges shall be adjusted by banks concerned.—*Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435.

§ 320 (7) Rule or Custom Limiting Time within Which Receiving Bank Can Return Notes or Checks That Are Not Good—

§ 320 (7a) Validity.—A custom or agreement between banks who are members of a clearing-house association that notes of the patrons of one of such banks, held for collection for the account of patrons of another of the banks, included in the clearing on the day they are due, and in that way conditionally paid, may be returned before a certain hour of the day if it is found they will be dishonored by the maker, thereby avoiding such conditional payment, and if not returned the payment to be considered absolute, is not void as violating the duty of the collection bank to the payee as well as the maker to have the note ready for delivery on payment during the entire business day, and banks so receiving and paying notes will be bound by such custom or agreement.¹⁵

§ 320 (7b) Construction.—The rules or regulations of clearing houses generally provide that when checks which are not good are sent through the clearing house, the banks receiving them shall return them to the senders by or before a specified hour of the day on which they are received. Under such a rule the payment of a check through the clearing house is provisional until the hour specified, but becomes complete if the check is retained after that hour.¹⁶ In some jurisdictions it has been held that if the failure to return the check until after the hour specified results from a mistake of fact, and the situation of the parties is not so changed thereby as to cause a loss to the bank to which the check is returned, the receiving bank may recover the amount of the check which it has thus paid.¹⁷

15. Custom held valid.—Atlas Nat. Bank v. National Exch. Bank, 176 Mass. 300, 57 N. E. 605.

16. Payment complete only if check is retained until after hour specified.

—The rules of an association of banks constituting a clearing house for effecting exchanges between themselves, and the payment of resulting balances, fixed a time before noon for making exchanges at the clearing house, and a time between noon and 1 o'clock for paying balances there. The practice under the rules was for the agent of the bank to make exchanges and payments according to tickets accompanying the vouchers presented for exchange, and not from an examination of the vouchers themselves in detail. Further rules provided that errors in the exchanges should be adjusted directly between the banks, and that, whenever checks which were not good should be sent through the clearing house, the banks receiving them should return them to the senders as soon as they were found not good, and in no case should they be retained after 1 o'clock. Held, that the payment of a

check through the clearing house was provisional until 1 o'clock, to become complete only if the check was retained after that hour. Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

17. Check retained until after hour specified through mistake of fact.—Atlas Nat. Bank v. National Exch. Bank, 176 Mass. 300, 57 N. E. 605.

The regulation of a clearing house association, that checks "which are not good shall be returned, by the banks receiving them, to the banks from which they were received, as soon as it shall be found that said checks are not good, and in no case shall they be returned after 1 o'clock," held not to preclude the right to return a check after that hour, provided the situation of the parties has not meanwhile so changed as to cause by such late action a loss to the bank to which it is returned. Merchants' Nat. Bank v. National Bank, 139 Mass. 513, 2 N. E. 89, disapproving Preston v. Canadian Bank, 23 Fed. 179.

Rule 1 of the New York clearing-house association providing that the

But in other jurisdictions it has been held that the receiving bank can not, under such circumstances, recover the amount it has paid.¹⁸ Where a bank receives a note as a debit item in its clearings, and treats the note as though it was a check, and charges the maker with the amount thereof, and does not return it within the time required, and there is no mistake of fact, the payment is absolute, and the amount thereof can not be recovered.¹⁹

return of checks paid through the clearing house and found not good should be made before 3 o'clock of the same day, does not entitle a bank which has received payment of a check, not good, through the clearing house, to refuse to refund the amount received because the check is not returned until after 3 o'clock, where an attempt is promptly made after discovery that the check is not good to return it within the time limit, and there has been no change in the meantime to the detriment of the bank to which returned. Judgment, 109 N. Y. S. 872, affirmed. *Citizens' Cent. Nat. Bank v. New Amsterdam Nat. Bank*, 128 App. Div. 554, 112 N. Y. S. 973, judgment affirmed in 198 N. Y. 520, 92 N. E. 1080.

18. C. deposited certain collaterals with P., K. & Co., bankers and members of the Chicago clearing house, with the understanding that he should have a right to draw checks on them within 10 per cent of the value of the securities. On August 5, 1881, C. drew his check for \$4,000, which was deposited with the defendant bank, also a member of the clearing house, to his credit, and went into the exchanges for collection through the clearing house on the morning of August 6th. Under the rules of the clearing house each member was required to pay its balances to the clearing house by 12 o'clock, and any check which was found not to be good when returned from the clearing house to the bank against which it was drawn, was to be returned to the bank which collected it through the clearing house by half past 1 o'clock of the same day. When C.'s check came from the clearing house into P., K. & Co.'s bank, his account was examined and the collaterals deemed sufficient to pay that check and others drawn on them by him, and they were handed over to the bookkeeper to be charged into his account. At 42 minutes past 1 o'clock P., K. & Co. heard that C. had failed, when a second examination was had and it was found that a mistake had been made, whereupon the check was sent to the defendant bank and payment demanded at 15

minutes before 2 o'clock and refused. P., K. & Co. brought suit against defendant to recover the amount of the check as money paid under mistake. Held, that they were not entitled to recover. *Preston v. Canadian Bank*, 23 Fed. 179.

Under a clearing house rule providing that all checks received at the clearing house, and not returned to the clearing bank on the same day before 2 o'clock, shall be deemed to have been paid with like effect as though they had been paid in currency at that hour by the bank on which it was cleared, a bank which did not return within the required time a check presented by another bank for payment was chargeable with the consequences of disregarding the rule, and could not recover the amount paid thereon, though the check was forged and the payee bank was not injured by the delay. *National Bank v. Mechanics' American Nat. Bank* (Mo. App.), 127 S. W. 429.

19. **Note retained until after hour specified not through mistake of fact.**

—There was a custom of passing notes through a clearing house with like effect as checks, except that the paying bank might request "time," thereby extending the time in which return thereof could be made from 1 to 2 o'clock. A bank received a rubber company's note as a debit item in its clearings, and charged the rubber company with the amount thereof, and, the rubber company delaying its payment, "time" was asked and granted. At 1:50 o'clock the cashier of the bank called up the rubber company by telephone, but failed to get communication with its officers. The cashier then went to lunch, returning at about 3 o'clock, and again called up the rubber company, and, in reply to information that it had made an assignment, stated that it was rough treatment, as the bank had paid the note. The bank then tendered the note back to the collection bank, which refused to refund the money. Held that, aside from the question of custom as to notes, the evidence as to the time when they might be returned being conflicting, the cir-

§ 320 (7c) Waiver.—Where a bank receiving a check on it through the clearing house returns it several days later to the bank from which it came, the latter bank, by refunding the money thereon, waives the rule of the clearing house requiring checks to be returned on the day they are received, and it can not recover back the money paid, though the first bank, on returning the check, stated that, if not paid, it would break off exchanges with the second bank.²⁰

§ 320 (8) Mutual Credits Given by Banks on Settlement Made through Clearing House.—Mutual credits given on a settlement made by two banks through the clearing house can not, without notice given before the hour when banks usually pass checks to the credit of their depositors, be recalled by either one to the detriment of the other.²¹

§ 320 (9) Reclamation by Bank Charged with Amount of Drafts or Checks Returned as Not Good.—Under the constitution of the New York clearing house, a bank charged by the clearing house with the amount of drafts or checks returned as not good can allow such charges to stand against it in the account of the clearing house, and seek reclamation directly from the bank required to refund such amount under the direct rules of the clearing house.²²

§ 320 (10) Who Is Liable Where Bank Pays Check through Clearing House by Mistake.—If a bank is entitled to maintain an action to recover back the amount of a check paid by mistake to another bank through the clearing house, the fact that the latter bank has credited the amount to the account of the customer depositing it does not render the depositor, instead of such bank, liable to the action.²³

§ 320 (11) What Amounts to Negligence in a Clearing-House Agent.—It was not negligence for a clearing-house agent to omit to send to the clearing house on Saturday a check on a bank which was closed on Friday, the agent having no knowledge or means of knowledge that the bank would resume payment on Saturday, and the clearings having been made on Saturday before the bank opened.²⁴

cumstances indicated that the bank treated the note as though it were a check, and that there was no mistake of fact, and the payment was absolute as against the receiving bank. *Atlas Nat. Bank v. National Exch. Bank*, 176 Mass. 300, 57 N. E. 605.

20. Waiver of rule.—*Stuyvesant Bank v. National Mechanics, etc., Ass'n* (N. Y.), 7 Lans. 197.

21. Mutual credits given by banks on settlement made through clearing house.—*Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251.

22. Constitution of New York clearing house construed.—Judgment 60 App. Div. 205, 70 N. Y. S. 78, affirmed. *Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N. Y. 244, 64 N. E. 810.

23. Who is liable where bank pays check through clearing house by mistake.—*Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89.

24. Clearing-house agent held not guilty of negligence.—*Farmers', etc., Bank v. Third Nat. Bank*, 165 Pa. 500, 30 Atl. 1008.

§ 320 (12) Effect of Insolvency of Bank, a Member of Clearing House.—Failure of a bank, before settlement for the day with the clearing-house association, but after surrendering demands against other banks and receiving credit on the settlement sheet, does not deprive the association of the right to collect such demands, and apply the proceeds to settle debits against the bank in accordance with the rules.²⁵ But the clearing house association has no lien giving it the right to appropriate, to an indebtedness due it on loan certificate account, against the receiver representing the other creditors, the balance appearing in favor of an insolvent bank, upon the last daily clearing made on the day of its failure, arising in reality after the insolvency, from the withdrawal, by the banks presenting them, of the checks held against the insolvent bank.²⁶ The appropriation of such balance by the association is a preference within the inhibition of a statute against preferences in the cases of insolvent banks.²⁷ A bank which, in payment of a clearing house check drawn in its favor on another member, and held as a result of the day's clearings, receives the proceeds of checks presented by such other member for clearing on the next morning, shortly before suspending payment, must account therefor to the bankrupt estate of such defaulting member, where the clearing house, in the revision of the clearings made necessary by such suspension, eliminated and returned the checks which had been debited against the defaulting member, and which were subsequently dishonored.²⁸

§ 321. Rights and Liabilities of Banks and Individuals Not Members—§ 321 (1) Upon Whom Clearing House Rules Are Binding.—The rules of a clearing-house association are adopted solely for the purpose of facilitating exchanges among the banks, which are its members.²⁹ They do not affect the rights and liabilities of banks and persons who are not members of the association or parties to its regulations.³⁰ The regular cus-

25. Effect of insolvency of bank, a member of clearing house.—*Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835, reversing decree 10 C. C. A. 562, 62 Fed. 645, 25 L. R. A. 824.

26. *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835.

27. *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835.

28. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. 289.

And this is no less true because the clearing house, under its rules, might have called on its other members to pay pro rata the amount of the checks drawn upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was a result of the clearings of the previous

day would not be entitled to participation. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. 289.

29. Purpose of adoption of rules.—*Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376.

30. Rights and liabilities of others than members not affected.—*National Exch. Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026; *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376.

A note was discounted by the B. Bank, and sent to the A. Bank, where payable, for collection, and there marked "Paid," by mistake, the discovery being made, later in the same morning, that the maker of the note had no funds in the bank, and at once the B. Bank and the indorsers were notified, and the note duly protested. A contention took place between the

tomers of or depositors in banks are not parties to the rules and regulations of a clearing house of which such banks are members, and are not, therefore, in a situation to claim the benefit of them, nor liable to be injuriously affected by them.³¹

§ 321 (2) Clearances Made by a Non-Member through a Member.—A bank which is a member of a clearing-house association can only agree and arrange to clear for a bank which is not a member in accordance with the conditions imposed by the constitution and rules of the association.³² Where a clearing-house association extends to a bank, which is not a member of the association, the right to have its checks cleared and paid through a bank which is a member, and the non-member agrees to pay to the association a specified annual sum for such privilege, and a contract is entered into between the two banks by which the member agrees to clear for the non-member in consideration of a deposit of a certain sum of money and bills receivable, such arrangement constitutes a tripartite agreement, upon ample consideration, for the mutual benefit of the three parties, and the relation of principal and agent, which the contract between the banks creates, is a mere feature of the larger contractual relation existing between such parties.³³ The parties to such a contract are bound by the constitution and rules of the clearing house in so far as they relate to clearances of checks by a member for a non-member.³⁴ The member is entitled to protest fees

banks as to whether, under the clearing-house rules, the note not having been returned to the B. Bank before a certain hour of the day, it became the property of the A. Bank, but the dispute was settled by the payment of the amount of the note to the B. Bank, the payment being expressly made without waiver of any legal rights, and at the trial the B. Bank disclaimed title to the note. Upon a suit by the A. Bank against the indorsers, held, that the note was not paid, and that defendants could not avail themselves of the clearing-house rules. *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376.

The failure of a bank paying a check drawn by a depositor in favor of a third person, who forwards it through another bank for collection, to offer to return the check to the collecting bank and to demand repayment, within the time prescribed by the rules of the association, does not impair its right to recover the amount from the third person, providing its right to recover is otherwise perfect. *National Exch. Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026.

An action by the holder against the drawee of a check for failure to observe a custom by which banks be-

longing to an association called the clearing house are bound to return checks presented through the clearing house, and which they have no funds to pay, upon the same day, or before banking hours of the next day, under penalty of being liable for the same, can not be maintained where plaintiff is not a member of the association. *Overman v. Hoboken City Bank*, 30 N. J. L. 61.

31. Customers of, or depositors in, banks not affected by rules.—*Louisiana Ice Co. v. State Nat. Bank (La.)*, 1 McGloin 181; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89.

32. Member can only agree to clear in accordance with constitution and rules.—*O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, affirming 83 Hun 610, 32 N. Y. S. 498.

33. Tripartite agreement between clearing house, a member and a non-member.—*O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, affirming 83 Hun 610, 32 N. Y. S. 498; *Davenport v. National Bank*, 194 N. Y. 568, 88 N. E. 1117, affirming 127 App. Div. 391, 112 N. Y. S. 291.

34. O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, affirming 83 Hun 610, 32 N. Y. S. 498; *Daven-*

in protesting the checks paid by it, when such protest, though unnecessary, was made at the request of the superintendent of banks.³⁵ The member is also entitled to expenses incurred, including counsel fees in collecting the bills receivable.³⁶ Where one bank, not a member of a clearing house, employs another, which is a member, to present checks through the house for the former, the first bank is bound by the second bank's refunding payment of a check returned later than the time allowed by the rules, and this though the second bank acted without actual authority.³⁷

§ 321 (3) Payment to Clearing House of a Draft Where the Owner Is Not a Member.—Where the owner of a draft not a member of the clearing house, indorses it to a bank for collection, and it is sent by the bank to a clearing house in due course, with other checks and drafts, and the bank is closed before the balance against it on the clearing-house settlement is adjusted, and thereupon the drawee, a member of the clearing house, pays to the clearing house the amount of the draft, the payment being to a stranger to the draft, who has no interest in the proceeds, nor authority to act as agent for the owner, is no defense to an action by the owners against the drawee for the amount of the draft.³⁸

§ 322. Security for Payment of Balances.—Ownership of Securities.—A clearing-house committee, created by the agreement of several banks, which receives deposits from such banks of securities, at a fixed ratio on their capital stock, and issues certificates therefor, to be used in paying balances, becomes an owner, for value, of the securities.³⁹

Indebtedness Secured.—Securities deposited by a bank, belonging to a clearing-house association, with the clearing-house committee, and pledged,

port *v.* National Bank, 194 N. Y. 568, 88 N. E. 1117, affirming 127 App. Div. 391, 112 N. Y. S. 291.

Where such a contract was entered into by the New York clearing-house association and two banks, one a member and the other not a member, it was held that rule 25 of the association, which provided that arrangements by a member to clear for an outside bank should not be discontinued without previous notice, and that the notice could not take effect until the completion of clearances on the day after receipt of the notice, was binding upon the parties to the contract, and that the member bank was required to pay checks on the non-member presented to the clearing house on the day after notice of discontinuance was given, though it knew at the time that the other bank was insolvent. Such payments therefore were not within the prohibition of Laws 1892, ch. 688, § 48, against payments by an insolvent corporation made with intent to prefer creditors,

and the money and securities held under the contract were applicable to the amount of the checks paid. *O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, affirming 83 Hun 610, 32 N. Y. S. 498; *Davenport v. National Bank*, 194 N. Y. 568, 88 N. E. 1117, affirming 127 App. Div. 391, 112 N. Y. S. 291.

35. *Davenport v. National Bank*, 194 N. Y. 568, 88 N. E. 1117, affirming 127 App. Div. 391, 112 N. Y. S. 291.

36. *Davenport v. National Bank*, 127 App. Div. 391, 112 N. Y. S. 291, affirmed in 194 N. Y. 568, 88 N. E. 1117.

37. Non-member bound by member's refunding payment of check returned later than allowed by rules.—*Stuyvesant Bank v. National Mechanics', etc., Ass'n (N. Y.)*, 7 Lans. 197.

38. Payment to clearing house of a draft where the owner is not a member.—*Crane v. Fourth St. Nat. Bank*, 173 Pa. 566, 34 Atl. 296.

39. Ownership of securities.—*Philler v. Patterson*, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896.

according to the clearing-house regulations adopted by the associated banks, first for payment of its daily balances, and next as security for other indebtedness due to members of the association, will be held, after payment of daily balances, to meet a deficiency in other securities given by it to the clearing-house committee, to provide for payment of clearing-house certificates issued to aid in maintaining its credit.⁴⁰

Agreement Not in Violation of Laws Relating to National Banks.—

An agreement between the national banks of a city, which formed a clearing-house association, that the several banks shall deposit in the hands of a committee securities for which the committee shall issue certificates, to be used in paying balances against the several banks, where the purpose of the plan is to facilitate the legitimate business of the banks, and it involves no element of speculation and no business undertaking by or on behalf of the associated banks, is not a violation of the laws relating to national banks.⁴¹

When Bank Is Not Entitled to Rescission of Contract and Restoration of Collaterals.—Where a bank has enjoyed and is still enjoying the benefits of a transaction whereby it executed its notes to a clearing-house association in return for clearing house certificates and deposited collateral to secure the same, and has not offered to restore the certificates, neither it nor its creditors are entitled to rescission of the contract and restoration of the collaterals to its receiver, even if, for any reason, it or they would otherwise be entitled to rescind.⁴²

Appropriation of Sum Realized from Claim of Insolvent Bank against Other Banks.—Upon the insolvency of a bank, a member of a clearing house, what appropriation shall be made of the sum realized from the claims of the insolvent bank against other banks in possession of the clearing house on the day of insolvency, is to be determined by the agreement of the parties interested, construed in the light of the constitution and

40. **Indebtedness secured.**—Philler v. Jewett, 166 Pa. 456, 31 Atl. 204.

41. **Agreement not in violation of laws relating to national banks.**—The national banks of a city formed a clearing-house association, to facilitate the settlement of daily balances between them at a fixed place, and agreed, in order to dispense with the handling of money, that the several banks should deposit in the hands of a committee either cash or securities at a fixed ratio on their capital stock, for which the committee should issue certificates to be used in paying balances against the several banks. Subsequently, the association, for the purpose of enabling the members to afford assistance to the mercantile and manufacturing community, and also to facilitate the daily inter-bank settlements, authorized the committee to receive from any member additional de-

posits of cash or securities, and issue securities therefor in such amount and to such percentage thereof as they deemed advisable, which certificates should be accepted in payment of daily balances, on condition that the deposits therefor should be held by the committee as a special deposit, pledged for the redemption of the certificates, and the committee were made the trustees for all the members of the association, and authorized to collect such deposits. Held, that there was no violation of the laws relating to national banks. Philler v. Patterson, 168 Pa. 468, 32 Atl. 26, 47 Am. St. Rep. 896.

42. **When bank is not entitled to rescission of contract and restoration of collaterals.**—Booth v. Atlanta Clearing House Ass'n, 132 Ga. 100, 63 S. E. 907.

rules of the clearing house, and the clearing house has no right to apply any part of such sum to its certificate loan account, if such appropriation constitutes a preference inhibited by statute.⁴³

§ 323. Actions—§ 323 (1) When Action upon an Account Stated Will Not Lie.—Where a bank acting as a clearing house between several contracting parties presents in one day, to one of such parties, two approximate balances in the nature of clearance statements, and owing to great financial excitement it is impossible to clear either statement, but the bank makes a large payment on one as a favor, no action will lie against the bank as upon an account stated.⁴⁴

§ 323 (2) Parties.—A clearing-house association is properly sued in the names of the committee who have entire control of its business, funds, and securities.⁴⁵

§ 323 (3) Pleading.—In an action against a clearing house agent for negligence in failing to collect a check the usual rules of pleading are applicable.⁴⁶

§ 323 (4) Evidence.—In an action by a bank to recover against another bank the amount of checks paid by the former to the latter through the

43. **Appropriation of sum realized from claims of insolvent bank against other banks.**—By special agreement a national bank, holding a large amount of clearing house certificates, instead of the usual deposit of securities as collateral for payment of its daily balance at the clearing house, each day left with the clearing house manager all checks drawn on it, and other evidences of its indebtedness received from other banks to be held until the balance due from it for the day was paid. On a certain day its claims against other banks amounted to \$70,005.36, while the claims against it amounted to \$117,035.21. While the vouchers representing these claims against it were held by the manager of the clearing house to secure the balance it owed, it was closed by the comptroller of the currency. Thereupon the clearing house collected the amount of the checks, etc., constituting a part of the \$117,035.21, from the banks from which they were received; and the balance of that amount, consisting of the due bills given by the bank for its balance of the preceding day, which, by agreement, were to be paid by way of set-off in the clearing, the manager collected by reducing to that extent the credit of \$70,005.36 given to the bank on account of the amount owing to it from other banks, and what remained of that credit was

applied on the loan-certificate account of the bank to the association. Held, that the receiver of the bank was not entitled to the entire \$70,005.36, irrespective of the outstanding due bills which it had agreed should be set off in the clearing, but the clearing house had no right to apply to the certificate-loan account the balance after deducting those due bills, and such appropriation of that balance was a preference within the inhibition of Rev. St., § 5242. *Yardley v. Philler*, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835, reversing 10 C. C. A. 562, 62 Fed. 645, 25 L. R. A. 824.

44. **When action upon an account stated will not lie.**—*National City Bank v. New York Gold Exch. Bank*, 101 N. Y. 595, 5 N. E. 463.

45. **Clearing-house association properly sued in names of committee.**—*Yardley v. Philler*, 58 Fed. 746.

46. **In such an action**, that on certain days defendant had an opportunity to collect the check, but did not present it, and negligently failed to collect it, is not an admission of negligence, as the charge is merely of failure to present the check at the counter of the bank on which it was drawn, which, in the absence of special facts and circumstances, is no part of the duty of a clearing-house agent. *Farmers', etc., Bank v. Third Nat. Bank*, 165 Pa. 500, 30 Atl. 1008.

clearing house, on the ground that the indorsements on the checks were fraudulent and unauthorized, the burden of establishing the fraudulent and unauthorized character of the indorsements is on plaintiff.⁴⁷ Where two banks deal through the clearing house through the agency of other banks which are members of that institution, the rules of the clearing house are competent evidence in a suit by one of such banks to recover money paid through the clearing house on a note payable at such bank, held by the other, which had been certified by the plaintiff by mistake.⁴⁸

§ 323 (5) Laches as a Defense.—In an action by a bank paying a check through the clearing house to recover the amount thereof against the bank to which it was paid, it was held that facts in evidence did not show that the plaintiff was guilty of laches in its dealings with the maker of the check.⁴⁹

47. Burden of establishing fraudulent and unauthorized character of indorsements.—*National Park Bank v. American Exch. Nat. Bank*, 88 N. Y. S. 271.

In such an action a verdict for plaintiff held against the weight of the evidence. *National Park Bank v. American Exch. Nat. Bank*, 88 N. Y. S. 271.

48. Rules of clearing house competent evidence.—*Mt. Morris Bank v. Twenty-Third Ward Bank*, 60 App. Div. 205, 70 N. Y. S. 78, affirmed in 172 N. Y. 244, 64 N. E. 810.

49. Facts not showing laches.—*Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. 89. The facts in this case were as follows: On a certain day demand was made by a bank upon B. for payment of demand notes, which were then deemed to be amply secured by a pledge of goods as collateral security. Two days after this B., who was a director in the bank, told the president of the bank

that he had sold, or bargained to sell, a certain quantity of goods, and the warehouse receipts were delivered to B., as agent of the bank, to enable him to transfer the goods sold, with the understanding that the money received therefrom would be applied upon the debt for which they were held as collateral security. About a week afterwards B. wrongfully deposited the money received from the sale to his own account in the bank; and three days later, against the balance thus produced, he drew a check on the bank, which was paid by that bank to another bank through the clearing house, of which both banks were members. The president of the bank on which the check was drawn, suspecting that B. was financially embarrassed, discovered that no payment had been made by B. on account of the goods intrusted to him for sale, and, looking at the condition of B.'s bank account, directed the return of the check to the bank to which it had been paid.

CHAPTER XIX.

VIII. TAXATION.

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§ 329 (4l) Mandamus to Correct Assessment.

§ 329 (4m) Injunctions to Restrain Assessment.

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§ 331 (1) Payment.

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§ 332 (2af) Scope of Inquiry.

§ 332 (2ag) Scope and Extent of Relief.

§ 332 (2ah) Imposition of Terms on Granting Injunction.

§ 332 (2b) Actions for Damages.

§ 333. Forfeitures and Penalties.

VIII. TAXATION.¹

§ 324. Nature and Extent of Power to Tax Banks—§ 324 (1) Power of State.—In General.—With regard to the power of the states to tax banks, the usual rule applies that the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission,² and, where there is no exemption from taxation in the charter, a bank may be taxed by the state without impairing any contract.³ It does

1. In this section on taxation while, for uniformity, the continuity of section numbering has been preserved, the key number system has not been adhered to, as the subject of taxation of banks and bank stock is treated under the West scheme in the title Taxation.

2. General power of states to tax.

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—*Providence Bank v. Billings* (U. S.), 4 Pet. 514, 7 L. Ed. 939.

3. *Providence Bank v. Billings* (U. S.), 4 Pet. 514, 7 L. Ed. 939; *State Bank v. Knoop* (U. S.), 16 How. 369, 14 L. Ed. 977; *Nathan v. Louisiana* (U. S.), 8 How. 73, 12 L. Ed. 992; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840, 19 S. Ct. 530,

so by its own inherent taxing power, subject to the federal constitution and valid federal laws.⁴ It is a well-established doctrine, however, that the state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress, to carry into effect the powers vested in the national government.⁵

Taxation of National Banks.—In accordance with the doctrine above set out, a state is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets, or franchises, except when permitted so to do by the legislation of congress.⁶ No conflict neces-

571; *Farmers', etc., Bank v. Owensboro*, 173 U. S. 663, 43 L. Ed. 850, 19 S. Ct. 875. See, also, *McCulloch v. Maryland* (U. S.), 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204.

The property of the Bank of the United States is subject to state taxation, as a state retains all rights of taxing individual property held within its jurisdiction which has not been expressly relinquished to the United States, with the exception of imposts or duties on exports. *Bank v. Deveaux*, Fed. Cas. No. 916.

A bank incorporated prior to St. 1812, c. 32, levying a tax on banks, is subject to that statute, and liable to be taxed under it. *Portland Bank v. Apthorp*, 12 Mass. 252.

4. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571.

The supreme court is without power to control or restrain the taxing power of a state, exercised within its constitutional limits. *Bank v. New York* (U. S.), 2 Black 620, 17 L. Ed. 451, 27 S. Ct. 571.

5. From opinion of Marshall, C. J., in *McCulloch v. Maryland* (U. S.), 4 Wheat. 316, 4 L. Ed. 579. See, also, *Old Nat. Bank v. Berkeley County Court*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. 584; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

As to the immunity from taxation of bonds or other securities issued by the United States, see post. "Acquisition of Exempt Property to Evade Taxation," § 327 (5).

6. **Taxation of national banks.**—*Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Old Nat. Bank v. Berkeley County Court*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. 584; *Davis v. Elmira Sav.*

Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502; *State v. Clement Nat. Bank* (Vt.), 78 Atl. 944; *Pittsburg v. First Nat. Bank*, 55 Pa. 45.

A state has no power to tax national banks without the consent of congress, since they are agencies of the federal government, and the power to tax involves the power to destroy. Order, 105 N. Y. S. 993, 120 App. Div. 838, reversed. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592.

National banks or banking associations, being instrumentalities of the general government, are not subject to control or taxation by the states, except in so far as congress may expressly permit. *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15.

The state within which a branch of the United States Bank may be established can not constitutionally tax it, nor pass any law to control or impede its operations, or the operations of the parent bank. *McCulloch v. Maryland* (U. S.), 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204; *Commonwealth v. Morrison* (Ky.), 2 A. K. Marsh. 75; *State v. Buchanan* (Md.), 5 Har. & J. 317, 9 Am. Dec. 534.

"Under this principle falls a national bank, since it has been held frequently to be an agency or instrumentality created for a public national purpose, and as such, necessarily subject to the paramount authority of the nation, and beyond the power or control or legislation of any state, save only so far as congress may confer upon the state that power." *Old Nat. Bank v. Berkeley County Court*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. 584, citing *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

This doctrine does not apply to a tax

sarily arises between the act of congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks.⁷ But if one method taxes elements of value which the other does not, it is illegal.⁸ Under a statute, enabling state banks to become national banks, and requiring them to pay all taxes imposed upon them by state laws to the date of their becoming national banks, a state bank is liable for taxes down to the date of the auditor general's certificate of its compliance with the requirements of the enabling act.⁹

Taxation of Nonresidents.—A law of a state, providing that all persons doing business in the state as bankers, merchants, or otherwise, and not residents of the state, should be assessed and taxed the same as if they were residents of the state, is valid.¹⁰ Shares of bank stock owned by nonresidents

on the real property of the bank, in common with other real property in a state, nor to a tax on the interest of the citizen of a state in the bank, in common with other similar property throughout the state. *McCulloch v. Maryland* (U. S.), 4 Wheat 316, 4 L. Ed. 579; *Bulow v. Charleston* (S. C.), 1 Nott & McC. 527.

The state tax law is to be construed in connection with the act of congress permitting the state to tax national bank stock, as the power of the state is derived entirely from the federal legislation. *First Nat. Bank v. St. Joseph*, 46 Mich. 526, 9 N. W. 838.

As to the power of the state to tax shares in national banks, or the real property of such banks, see post, "Real Property," § 326 (2bb); "National Bank Shares," § 326 (2bc).

Acts of congress relating to state taxation of national banks not retroactive in operation.—Act Cong. Feb. 10, 1868, modifying the construction of § 41 of the Act of June 3, 1864, relative to state taxation of national banks, operated to change the mode of such taxation from that time forward, but had no retroactive effect upon proceedings to impose a state tax, previously had. *Abbott v. Bangor*, 56 Me. 310.

7. Method of taxation may be different.—*San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384; *National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 19 L. Ed. 701.

8. So where "in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to is assessed and taxed, whilst in the other case, that of

state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations forbidden by the act of congress." *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384.

9. Liability for state taxes prior to date of becoming national bank.—*Manufacturers', etc., Bank v. Commonwealth*, 72 Pa. 70.

A state bank, under Act Cong. June 3, 1864, became a national bank on October 28, 1864. On December 5th it furnished to the auditor general the evidence that it had complied with the enabling act August 2, 1864, which was certified December 19th, by the auditor general to the governor, who caused publication to be made on December 21st that the bank had become a national institution. Held, that the bank was liable to the state for all taxes to December 19th, since such enabling act requiring the bank to pay all taxes imposed on it by the state laws to the date of its becoming a national bank. *Manufacturers', etc., Bank v. Commonwealth*, 72 Pa. 70.

10. Taxation of nonresidents doing business as bankers.—*Duer v. Small*, Fed. Cas. No. 4,116, 4 Blatchf. 263, 17 How. Prac. 201.

Certain Canadian banks did business in New York City through agencies permanently located there. These agencies held funds of the banks, which were loaned on call or for specified times to borrowers. Held, that the banks were liable to taxation on the amounts invested in their business in this state, under Laws 1855, c. 37, sub-

may, by legislative enactment, be made taxable at the place of the corporation of which it is an incident.¹¹ Stock of national banks in one state held by a savings bank of another state is taxable in the former state, though the property of such bank is exempt by the laws of its own state.¹²

§ 324 (2) Power of United States.—A bank incorporated and organized under the laws of one of the states of the Union, with its principal place of business within the United States, is subject to the sovereign power of the United States, and a proper object of taxation. The investments abroad are still the property of the bank and part of its capital and taxable by the United States. In the absence of any averments to the contrary, it is presumable they were such as banks usually make in doing a banking business, and that their legal situs was at the home office of the corporation.¹³

§ 324 (3) Power of Territories.—The same power of taxation in respect to national banks exists in the territories that does in the states.¹⁴

§ 324 (4) Purposes of Taxation.—The validity of taxation of banks or their property or shares of bank stock for particular purposes, as, for instance, for school,¹⁵ or county or municipal purposes,¹⁶ is dependent upon

jecting to taxation nonresident associations doing banking business here, and they could not claim exemption under Laws 1851, c. 176, § 2, exempting moneys in the hands of agents of nonresident capitalists sent here for investment. *People v. Commissioner of Taxes* (N. C.), 1 Thomp. & C. 630.

11. Taxation of shares of bank stock owned by nonresident.—*Nashville v. Thomas*, 45 Tenn. (5 Coldw.) 600; *Bedford v. Nashville*, 54 Tenn. (7 Heisk.) 409, overruling *Union Bank v. State*, 17 Tenn. (9 Yerg.) 490.

12. Taxation of property of savings bank exempt by law of its own state.—*People v. Coleman*, 63 Hun 633, 18 N. Y. S. 675, 45 N. Y. St. Rep. 136, affirmed *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022. See post, "Exemptions," § 327.

13. Federal taxation of state banks.—*Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703.

Quære, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply. *Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703.

14. Power of territories to tax national banks.—Under Rev. St., § 5134 et seq. [U. S. Comp. St. 1901, p. 3454], providing for the incorporation of national banks in both states and territories, the territories have the same power to tax national banking associations located in them as have the states, notwithstanding that § 5219 [U.

S. Comp. St. 1901, p. 3502], which expressly confers the power to tax such associations, only mentions states, and provides that, in assessing taxes imposed by the authority of the "state within which the association is located," the shares in such association may be included in the valuation of the personal property of the owner of them. *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, affirming *Silver Bow v. Davis*, 6 Mont. 306, 12 Pac. 688.

The word "state," where used in The National Currency Act of 1864, and the amendments thereto, should be construed to mean "territory" as well, and national bank shares may be taxed, therefore, in the territories as well as in the states. *People v. Moore*, 1 Idaho 504.

15. Liability of banks to local taxation for school purposes.—*Fremd v. Deposit Bank*, 19 Ky. L. Rep. 825, 42 S. W. 102.

Under Act March 15, 1867, providing that nothing therein shall be so construed as to authorize the taxation of stock in a bank for municipal purposes in a city is not a tax levied for national bank for schoolhouse purposes in a city is not a tax levied for municipal purposes, where they are levied to carry out the system of common-school education provided for by the state. *Root v. Erdelmeyer*, 37 Ind. 225; *Evansville v. Bayard*, 39 Ind. 450.

16. Validity of taxation for municipal purposes.—Under the general

the statutes of the various states.

§ 324 (5) Delegation of Power.—The well-established rule that a state, in the distribution of the powers of the government, may commit to one body the power to levy certain taxes, and to another the power to levy others, applies to state taxation of banks, and a county or other municipal corporation may, in the exercise of power delegated by the state, tax the property of banks, where the state itself would have power to levy such tax.¹⁷

law for the incorporation of cities (Acts Sp. Sess. 1865, p. 22, § 41), no tax can be imposed for municipal purposes upon the shares of the bank of the state; and, as the act of congress organizing national banks forbids any discrimination against the shares of that class of banks, stockholders in the latter can not be taxed for municipal purposes. *Craft v. Tuttle*, 27 Ind. 332.

The validity of a tax levied by a city for municipal purposes on national bank shares held on April 1st, pursuant to the authority conferred by Act March 4, 1873, is not impaired by the fact that the money paid for such stock may have been taxed for municipal purposes to the same person as money on hand on the 1st day of January. *Richmond v. Scott*, 48 Ind. 568.

The capital stock of a state branch bank located in an incorporated city or town is liable to be taxed there for the purposes of municipal revenue, although part of the stockholders reside elsewhere. *McGregor v. McGregor Branch*, 12 Iowa 79.

Under Act March 4, 1873, authorizing the levying of taxes on national bank shares for municipal purposes, a tax may be levied by an incorporated city on the shares of the stock of a bank organized under The National Banking Law, at the same rate as on real and other personal property within the city, though there are still in existence branches of the Bank of the State of Indiana, the shares of stock of which are not subject to municipal taxation. *Richmond v. Scott*, 48 Ind. 568.

Act May 17, 1886, art. 2, § 1, imposes a tax on stock, undivided profits, surplus, etc., belonging to banks, to "be in full of all tax—state, county and municipal;" and section 7 provides that nothing in the act shall be construed as exempting from taxation, "for county and municipal purposes," any real estate or building used and owned by said banks in conducting their business. Held, to authorize the

taxation for municipal purposes of a building so owned and used. *Louisville Trust Co. v. Louisville*, 17 Ky. L. Rep. 265, 30 S. W. 991.

The statutes in terms provide for the taxation of national bank shares for state, county, and town purposes only, and for uniform taxation. The shares of stockholders who reside wherein an organized fire district in the town where in the bank is located can not, therefore, be assessed for fire district purposes. *Rich v. Packard Nat. Bank*, 138 Mass. 527.

Under Acts 1883-84, p. 568, § 17, providing that stockholders in state banks shall be assessed and taxed on the market value of their shares of stock; the city charter of Richmond, conferring the general power of taxation within the limits of the state and federal laws; and an ordinance providing for a tax on shares of bank stock—the city of Richmond can levy a tax for city purposes on the shares of stock of a local bank. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

A bank, located in a village authorized to raise money by tax for certain purposes, is liable to pay its portion of the village taxes, and its real and personal property is accordingly subject to taxation. *Ontario Bank v. Bunnell* (N. Y.), 10 Wend. 186.

17. Exercise by municipal corporations of delegated power of state to tax banks.—*Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, appeal dismissed for want of jurisdiction. *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Constitution, § 157, prescribes the tax rate for cities and taxing districts. Section 158 limits the amount of bonded indebtedness which may be incurred by any city or taxing district. Section 159 declares that when any city or taxing district is authorized to contract an indebtedness it must provide at the same time for taxes sufficient to pay the interest thereon. Sec-

§ 324 (6) Power to Cure Defects or Irregularities.—With regard to state taxation of banks the usual well-established doctrine applies that curative legislation is admissible in cases where the law in fact imposes taxation

tion 180 declares that the general assembly may authorize counties, towns, etc., to levy a poll tax, and § 181 declares that the general assembly shall not impose taxes for the purpose of any county or municipal corporation, and may by general laws confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The National Bank Act (Rev. St., § 5210 [U. S. Comp. St. 1901, p. 3498]) provides that the shares of any national bank shall be included in the valuation of the personal property of the owner in assessing taxes imposed by authority of the state. Held, that Act March 21, 1900 (Acts 1900, p. 65, c. 23), whereby county authorities are authorized to levy taxes on the shares of a national bank, is not violative of the National Bank Act, inasmuch as such action on the part of the county authorities is the exercise of an authority delegated by the state. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100, dismissed *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Under Act Cong. Feb. 25, 1804 (2 Stat. 255), giving the common council of Alexandria general power to raise money by taxation for the use and benefit of the town, the city might tax the banks within its jurisdiction, and collect the tax by distress and sale of the goods of the bank. *Farmers' Bank v. Fox*, Fed. Cas. No. 4,658, 4 Cranch 330.

Under the act incorporating the city of Montgomery, its power to levy taxes is confined to a tax on real estate, personal property specifically enumerated, certain pursuits, callings, professions, and occupations, or business of a particular kind, or the receipts and incomes of some particular business. There is no general power to impose taxes on personal property, nor any specific power which can be construed to authorize the city to tax shares of the capital stock of a national bank. *Baldwin v. Montgomery*, 53 Ala. 437.

Under Act 1825, § 7, authorizing the authorities of Savannah to raise by tax and assessment on all real and personal estate within the city limits all sums necessary for the good government of the city, the authorities have no power to tax banks in their cor-

porate capacity. *Bank v. Savannah, Ga.*, Dud. 130.

Under Act 1825, § 7, authorizing the municipal authorities of Savannah to raise by tax and assessment on all real and personal estate within the city, and sums necessary for the good government of the city, the city may tax bank stock in the hands of the holders residing therein. *Bank v. Savannah, Ga.*, Dud. 130.

No special power of taxing banks in their corporate capacity on account of their stock is given to the city of Savannah by Act 1825, and no such power can be implied from the general power to tax all real and personal estate within its limits conferred by that act, though the city may tax bank stock in the hands of the holders living within the city. *Bank v. Savannah, Ga.*, Dud. 130.

A municipal corporation has authority to levy and collect a tax on all property within its corporate limits subject to taxation by the general laws, and no special power is required from the state to enable it to levy and collect legal taxes on the shares of stockholders of banks located within its limits. *Augusta v. National Bank*, 47 Ga. 562.

Under the Act of March 11, 1861, it is competent for cities, organized under the general municipal law of the state, to assess and collect taxes for the year 1861 on stock in any of the free banks of the state located in such cities, whether owned by persons residing in such cities or elsewhere. *De Pauw v. New Albany*, 22 Ind. 204.

The charter of the city of Greensboro authorizes the city to levy and collect taxes on "all real and personal property whatever, which may at the same time be subject to taxation by the state." Held, that the commissioners of the city have power under the charter to tax the stock of the Bank of Greensboro, the charter of which requires it to give in its stock for taxation. *Bank v. Greensboro*, 74 N. C. 385.

A tax levied by a municipal corporation on the solvent credits of a bank in excess of the limitation prescribed by Act 1890 (Laws 1890, p. 9), which provides that "cities and towns are prohibited from levying or collecting any other tax on banks, or on solvent credits, owned by individuals or cor-

upon property, which, however, is overlooked by the assessor, or otherwise omitted from the assessment, or some other step is taken which is faulty.¹⁸ It would seem, however, that a legislature can not, under the appearance of a curative statute, constitutionally enact a retroactive law imposing taxes for previous years upon the property of a bank which was not, during such years, subject to taxation under any valid law.¹⁹

§ 325. Constitutional Requirements and Restrictions—§ 325 (1) Constitutional Provision as to Situs.—It seems to be conceded that a tax can not be assessed where there is no jurisdiction of either the person or the property.²⁰ While it is true, as a general rule, at common law that personal property has no situs of its own, but follows the person of its owner, the rule is merely one of convenience, and in the absence of a constitutional prohibition the legislature may change the rule.²¹ So where the constitution does not prohibit it, the legislature may provide for taxing shares of national banks at the place where the bank is located without regard to the residence of the owners of such shares.²² The constitution of Illinois does not contain such a prohibition.²³ The United States circuit court has held that a tax act which provides that taxes are to be assessed by the authorities of counties, etc., upon the shares of national banks in the county, etc., where the bank is located, without regard to the residence of the shareholder, is a violation of the constitutional provision requiring the collection of uniform taxes of persons and property within the jurisdiction of the body imposing the same.²⁴

porations, greater than 75 per cent of the state tax," is illegal, regardless of the purpose for which it is levied. *Huntley v. Bank*, 69 Miss. 663, 13 So. 832.

18. Power to cure defects or irregularities.—First Nat. Bank *v.* Covington, 103 Fed. 523.

19. Invalidity of retroactive legislation under guise of curative statute.—First Nat. Bank *v.* Covington, 103 Fed. 523.

Ky. St., § 4077, provided for the taxation of the franchises of all corporations for state and local purposes. As applied to national banks, such statute was held invalid by the supreme court of the United States, as in violation of Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], which prohibits the taxation of shares of national banks at a greater rate than is imposed on other moneyed capital. By Act of March 21, 1900, it was provided that shares of stock of national banks should be assessed and taxes collected thereon in the same manner as real estate, and (§ 3) that such banks which had not paid franchise taxes under the prior law should be assessed on their stock thereunder for

the years subsequent to 1892. Held, that such retroactive provision could not be upheld as a curative statute, the prior law being void as to national banks, and that it was itself invalid, as in violation of Rev. St., § 5219, being applicable to national banks alone, without any provision for the retroactive taxation of other moneyed capital in the hands of individual citizens, and it being very improbable that the tax thereby imposed was the equivalent of the franchise tax required to be paid by other corporations. First Nat. Bank *v.* Covington, 103 Fed. 523.

20. Jurisdiction of person or property essential.—First Nat. Bank *v.* Smith, 65 Ill. 44; Union Nat. Bank *v.* Chicago, Fed. Cas. No. 14,374, 3 Biss. 82.

21. Situs for taxation.—First Nat. Bank *v.* Smith, 65 Ill. 44. See post, "Place of Taxation," § 328.

22. Situs for taxing shares in national banks.—First Nat. Bank *v.* Smith, 65 Ill. 44.

23. Illinois constitution does not contain prohibition.—First Nat. Bank *v.* Smith, 65 Ill. 44.

24. Statute held unconstitutional.—Act Ill. June 13, 1867, which directs

§ 325 (2) General Laws, Equality and Uniformity—§ 325 (2a)

In General.—There is nothing in the federal constitution which requires that state taxation be equal, uniform or just.²⁵ When speaking with reference to the states' constitutions it may be said that it is a constitutional requirement that property be assessed under general laws, and by uniform rules.²⁶ It is not necessary to the validity of the law that it operate upon all persons in the state alike.²⁷ It is sufficient if it be general and uniform in its operation upon all persons similarly situated, and this is true whether individuals or corporations are affected.²⁸ Hence it would seem that tax laws must be general as contradistinguished from special.²⁹ A law which provides a fixed and specific rule for the assessment of property of one class of corporations or individuals, different from that applicable to all other classes, is not a special law within the inhibition.³⁰ Although the rule is that

taxes to be assessed by the authorities of counties, cities, etc., upon the shares of banks in the county or town where the bank is located, without regard to the residence of the owner or the situs of the shares, is in contravention of the state constitution, which provides for the collection of uniform taxes of persons and property within the jurisdiction of the body imposing the same. *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82.

25. No provision in federal constitution.—*Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Memphis, etc., Co. v. Shelby*, 109 U. S. 398, 27 L. Ed. 976, 3 S. Ct. 205; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 S. Ct. 593; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 13 S. Ct. 721; *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

"It is said in *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829, and again in *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. Ed. 949, 22 S. Ct. 673, that the 'whole argument of a right under the federal constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Commonwealth*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533.'" *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

P. S. 804-820, providing for taxation of interest-bearing national bank deposits, is not unconstitutional because its effect is to withdraw from local taxation personal property of great value, resulting in a discrimination against the taxpayers having choses in action other than national bank deposits by diminishing the grand list, and thus

raising the rate of local taxation, the average of which is more than the rate imposed on such deposits; there being no constitutional requirement that state taxation shall be equal, uniform, or just. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

26. Equality and uniformity.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586; *Appeal of Banger*, 109 Pa. 79; *Hempstead County v. Hempstead County Bank*, 73 Ark. 515, 84 S. W. 715; *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82; *Campbell v. Brinkop*, 238 Mo. 298, 143 S. W. 444.

27. *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

28. *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

29. Laws must be general.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

30. What is a special law.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

"Therefore it has been held that an act which provided a specific rule for the assessment of express and telegraph companies operating and doing business within this state, different from that applicable to the assessment of other property, was not a special law. *United States Exp. Co. v. Ellyson*, 28 Iowa 370, 374. And the same rule has been applied to the assessment of railway property. *Central Iowa R. Co. v. Board*, 67 Iowa 199, 25 N. W. 128; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94. See, also, *Missouri, etc., Bridge Co. v. Harrison County*, 74 Iowa 283, 37 N. W. 372. We are of the opinion that the statute in question is general, not because it operates upon all persons within the state alike, but because it

taxation of property should be by the operation of a general law, yet where a particular species of property is omitted from taxation for a given year, there is no inhibition on the legislature to pass a special law to cure the omission.³¹

The rule that the taxes must be uniform means that all individuals and all classes must be required to share uniformly with like individuals and like classes the burdens of taxation. It does not mean that taxes may be required of some which are not exacted of others, but that all persons subject to the same conditions must be uniformly taxed.³² Equality and uniformity of taxation require that individuals in classes be treated alike.³³ Absolute uniformity and equality of taxation in all cases and with respect to all kinds of property are not practicable.³⁴ If the ability of the tax laws to stand successfully the test of equality of burden determines their validity, none of them can stand.³⁵

Want of Uniformity Due to Difference in Circumstances.—A law taxing banks which may operate with practical uniformity at first produces

applies alike to all banking associations organized under the general incorporation laws of the state, known as 'state or commercial banks.' " *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

31. Special law to cure omission.—*McVeagh v. Chicago*, 49 Ill. 318.

Act June 13, 1867, requiring the shares of bank stock to be assessed for the year 1867 with regard to the ownership and value of such shares on the 1st day of July, 1867, instead of the 1st day of the preceding April, does not violate the constitutional provision for equality and uniformity in taxation. *McVeagh v. Chicago*, 49 Ill. 318.

32. Rule as to uniformity.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801; *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82.

33. Individuals treated alike.—*Pullman State Bank v. Manning*, 18 Wash. 250, 51 Pac. 464. See post, "Exemptions," § 327.

Pol. Code, § 3695, subd. 8, relating to assessment for taxation, authorizing private bankers to deduct deposits from moneys on hand, is violative of Const., art. 12, § 11, requiring taxes on the same class of subjects to be uniform, and § 16, providing that all property shall be assessed in the manner prescribed by law, except as otherwise provided in the constitution. *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

A city of the third class by ordinance directed that a certain tax should be imposed upon "all personal

property, and all objects and things assessed as unclassified." In pursuance of this provision, the assessors were directed "to assess all offices and posts of profit, professions, trades, and occupations," according to the income derived from each. The assessors assessed laboring men, clerks, and professional men according to the income derived from their occupation. Bankers and business men were assessed in proportion to the sum that it would cost to hire a clerk to perform their duties. Upon application by a taxpayer for an injunction to restrain the collection of a tax assessed upon his occupation as above, held, that the tax was an income tax not authorized by law; that its assessment was in violation of art. 9, § 1, Const. Pennsylvania, requiring all taxes to be uniform on the same class of subjects, and that an injunction would therefore issue. *Appeal of Banger*, 109 Pa. 79.

Revenue Act 1893, as amended by Sess. Laws 1895, p. 508, provides that in making up the amount of money or credits, "other than bank stock," required to be listed or assessed, bona fide debts may be deducted. Held, that the quoted exception conflicts with Const., art. 7, § 2, requiring uniformity of taxation, provided that a deduction of debts from credits may be authorized. *Pullman State Bank v. Manning*, 18 Wash. 250, 51 Pac. 464.

34. Absolute uniformity not practicable.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

35. Commonwealth v. Merchants', etc., Nat. Bank, 168 Pa. 309, 31 Atl. 1065.

noticeable inequality as the result of differences in location and management begin to develop themselves. This inequality results from circumstances which the legislature could not foresee or provide against and for that reason they can not be charged against the law.³⁶ Of a want of equality of burden that results from circumstances affecting particular banks, and which is not produced by the application of the law, the banks can not complain.³⁷

Want of Uniformity Due to Application of Law.—Where there is a want of uniformity and equality in the taxation imposed, which is due to the application of the law, such statute, it seems, contravenes the constitutional requirement of uniformity and equality.³⁸ A law providing that the shares of the banks in a particular locality shall be taxed without regard to the residence of the owner of the shares, being unconstitutional and void as to the shareholders not residing in the district where the bank is located, is also

36. Differences of circumstances.—*Commonwealth v. Merchants', etc.*, Nat. Bank, 168 Pa. 309, 31 Atl. 1065.

37. Circumstances affecting particular banks.—*Commonwealth v. Merchants', etc.*, Nat. Bank, 168 Pa. 309, 31 Atl. 1065.

38. Want of uniformity due to application of law.—*Commonwealth v. Merchants', etc.*, Nat. Bank, 168 Pa. 309, 31 Atl. 1065. See post, "Injunction," § 332 (2a).

Rev. St., § 2759, relating to the taxation of unincorporated banks, provides that the manager of every such institution shall make a statement setting forth—"First, the average amount of notes and bills receivable, discounted or purchased in the course of business by such unincorporated bank, and considered good and collectible; second, the average amount of accounts receivable; third, the average amount of cash and cash items in possession or in transit; fourth, the average amount of all kinds of stocks, bonds (including United States government bonds), or evidence of indebtedness, held as an investment, or in any way representing assets; fifth, the amount of real estate at its assessed value; sixth, the average amount of all deposits; seventh, the average amount of accounts payable, exclusive of current deposit accounts; eighth, the average amount of United States government and other securities that are exempt from taxation; ninth, the true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law

exempt from taxation, and the remainder thus obtained, added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward, or township." Held that, in so far as this section authorizes the deduction of any liabilities of the bank from its cash "in possession or transit," it is in contravention of Const., Ohio, art. 12, § 2, which provides that "laws shall be passed, taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money." *Treasurer v. People's, etc., Bank*, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196.

But the deductions authorized by such section from the other items named therein are not in contravention of Const., art. 12, § 2, or of § 3, which provides that "the general assembly shall provide, by law, for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description (without deduction), of all banks, now existing, or hereafter created, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals;" for the term "credits" as used in such section of the constitution means the excess of the sum of all legal claims and demands due a person, over and above the sum of the legal bona fide debts due by him. *Treasurer v. People's, etc., Bank*, 47 O. St. 503, 25 N. E. 697, 10 L. R. A. 196.

void as to those who do reside there; otherwise, the tax would not be uniform.³⁹

Inequality Resulting from Misconduct of Officer.—Inequality or lack of uniformity in the assessment of property for taxation may result not only by applying different rates of assessment, but from misconduct of taxing officers by which property of one person or class of persons or a particular class of property is assessed at a valuation greater in proportion to its real or cash value than is placed on the mass of other taxable property.⁴⁰

Constitutional Restriction a Limitation upon Legislature.—A constitutional requirement that the rule of taxation shall be uniform is a limitation upon the legislature in the exercise of its general power to levy taxes, and not a restriction upon the people in the exercise of a power reserved to them by their constitution.⁴¹ So where the constitution of a state reserves to the people all legislative power upon the subject of banks and banking, that portion of the banking law of that state which regulates the taxation of the capital stock of banks is not in violation of the constitutional requirement of uniformity.⁴²

Double Taxation as Nonuniform.—It is not uniform to collect a double tax on property owned by a bank or insurance company and a single tax on the same kind of property held by an individual or a manufacturing company.⁴³

§ 325 (2b) Classification of Subjects and Uniformity as to Same Subject.—Where a constitution provides, generally, that “all taxes shall be uniform upon the same class of subjects, etc.,” it seems that property may be classified and different rates of taxation put upon it.⁴⁴ A constitutional requirement of proportional contributions for the support of the government is not intended to restrict the state to methods of taxation that operate equally upon all its inhabitants regardless of the variety and measure of

39. *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82. See post, “State Taxation,” § 326 (2b).

40. **Inequality resulting from misconduct of officer.**—*First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

41. **Constitutional restriction a limitation upon legislature.**—*State v. Hastings*, 12 Wis. 47.

42. **Constitutional requirement of uniformity not applicable.**—The restrictions of the constitution requiring uniformity of taxation is not a limitation of this power of the people; and Rev. St., c. 71, § 20, is constitutional, though imposing a tax on banks, not in uniformity with the general rule of taxation. *State v. Hastings*, 12 Wis. 47.

“The people having reserved the power, it is difficult to see how the restrictions of the constitution can be

applied to it. The reservation is absolute and unqualified, and carries with it the authority to prescribe what the law shall be in all respects. The constitution is elsewhere silent upon this particular subject, and leaves the action of the people free and unrestricted. It is so much legislative or political power taken out of its operation, and retained to be acted upon by the people, in the same manner as the constitution itself. It is not, therefore, within the spirit or object of the restrictions of the constitution.” *State v. Hastings*, 12 Wis. 47.

43. **Double taxation as nonuniform.**—*Campbell v. Brinkop*, 238 Mo. 298, 143 S. W. 444. See post, “Double Taxation,” § 325 (3).

44. **Classification of subjects.**—*Savannah v. Weed*, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270.

advantages derived from its protection and regulation.⁴⁵ Such a constitutional injunction does not forbid the classification of property for the purposes of taxation;⁴⁶ the true criterion is whether or not all property of the same class is taxed alike;^{46a} nor does it require a uniform method of as-

45. Meaning of proportional contribution.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *In re Hickok*, 78 Vt. 259, 62 Atl. 724.

P. S. 804-820, taxing certain interest-bearing national bank deposits, is not in conflict with the state constitutional provision requiring from every member of society a proportional contribution toward the expenses of the government; such provision only requiring that governmental expenses be apportioned equally, and not that the exaction levied on the property should be equal, and the provision not being intended to restrict the state to methods of taxation that operate equally upon all its inhabitants regardless of the variety and measure of the advantages derived from its protection and regulation. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

46. Classification.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586; *State Board v. Central R. Co.*, 48 N. J. L. 146, 4 Atl. 578.

"In the case of *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654, a tax was objected to as violating the constitutional rule of equality and uniformity. It was said: 'If the precise point here is that the tax is unequal and unjust because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the legislature, and not us. Courts can not annul taxes because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever, for there never was yet a tax law that was not more or less unequal and unjust in its practical workings.' * * * Apportionment of taxation is purely a legislative function.'" *Bacon v. Board*, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524.

"The provision of the constitution relied on by defendant has not deprived the legislature of the power of dividing the business of legislation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in

the same class. This doctrine is supported by *State v. Lathrop*, 10 La. Ann. 398; *Hughes v. Cairo*, 92 Ill. 339; *Lee v. Sturges*, 46 O. St. 153, 19 N. E. 560, 2 L. R. A. 556; *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240, 5 S. Ct. 1014; *Graham v. St. Joseph*, 67 Mich. 652, 35 N. W. 808." *Bacon v. Board*, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524.

46a. True criterion.—*Laws 1890*, pp. 8, 9, prohibiting cities and towns from levying or collecting any tax on banks larger than 75 per cent of the state tax, applying to all property of the same class, are not in violation of Const. 1869, art. 12, § 20, requiring taxes to be uniform. *Adams v. Bank*, 78 Miss. 532, 29 So. 402.

"In the case of *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395, this court decided that a similar act of the legislature, passed in 1894, was violative of § 112, Const. 1890, and was null and void. Counsel for appellant relies upon the opinion in that case; and we are asked to give the views therein expressed a retroactive effect, and to declare the act of the legislature of 1890 void under the 'equality and uniformity clause' of the constitution of 1869. We adhere to the decision of the court in the case of *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395, believing it to be right upon principle and authority; but we decline to give it any retroactive effect, so as to make the views therein expressed apply to actions arising under laws which were passed prior to the adoption of § 112, Const. 1890." *Adams v. Bank*, 78 Miss. 532, 29 So. 402.

"In a line of decisions beginning with *Daily v. Swope*, 47 Miss. 367, including *Vasser v. George*, 47 Miss. 713; *Mississippi Mills v. Cook*, 56 Miss. 40; *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219, and other cases, the court had gradually come to a judicial expression of the view that 'the subjects of taxation may be classified at the discretion of the legislature, and, if all of the same class are taxed alike, there is no violation of the equality and uniformity required by the constitution.' The conclusion of the court announced in these cases was accepted and uniformly acted upon prior to the adop-

assessment.⁴⁷ The legislature must prescribe the methods of ascertaining the value of the property to be taxed, and it may prescribe different regulations for different classes of property.⁴⁸ And, if not restricted by constitutional provision, the legislature may impose a tax on one class of property, and completely exempt another class.⁴⁹

Tax Ad Valorem.—Where a constitution provides that “all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed, etc.,” all real and personal property must be taxed according to its value.⁵⁰ The constitution treats property as but one subject and prescribes the rule of uniformity as to it by requiring that all property subject to be taxed shall be taxed ad valorem.⁵¹

Arbitrary or Reasonable Classification.—The question arises as to whether or not the classification of property for the purposes of taxation is

tion of the constitution of 1890. It was with the light of the judicial interpretation announced in these cases before it that the constitutional convention of 1890 adopted § 112, which provides that property shall be assessed for taxes at its true value.” *Adams v. Bank*, 78 Miss. 532, 29 So. 402.

47. Uniform method of assessment not required.—*Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

1 Ballinger's Ann. Codes & St. 1897, § 1671, provides that no person shall list for taxation any share of any corporation which he holds, where the corporation has listed its capital stock and property for taxation. Section 1677 provides that the shares of stock in banks shall be assessed to the owners at their fair value in money, first deducting the proportionate part of the value of the bank's realty, at the same rate at which other moneyed capital of individuals is assessed. Held, that an assessment of a bank for taxation on shares of stock of other corporations held by it is not in violation of Const., art. 7, § 2, requiring a uniform and equal rate of assessment and taxation on all property, since the requirement does not relate to uniform methods of assessment. *Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

48. Legislature must prescribe.—*Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

49. Exemptions.—*Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936. See post, “Exemptions,” § 327.

“In the cases of *Newport v. Mudgett*, 18 Wash. 271, 51 Pac. 466, and *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464, debts were authorized to be deducted from a share of

bank stock because a deduction of such debts was authorized from all other credits owned by individuals in the state, by general law, and shares of bank stock are assessed and taxed as personal property of the individual holder of such stock, and the tax levied upon his stock was there held to be a tax upon a credit; and thus his bank stock, viewed as a credit, was entitled to be assessed, under the same privilege of deduction of his debts, as in the same class with all other credits assessed in the state. When the share of bank stock was assessed as a credit, then it fell within the class of credits, and the rule of uniformity required that the same deduction of debts be allowed upon it as upon all other credits; and, further, to satisfy the rule of uniformity, if a portion of any class of property is exempt from taxation, the whole class of such property must be exempt.” *Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

50. Taxation according to value.—The tax ordinance of the city of Savannah, imposing a tax of $2\frac{1}{8}$ per cent on real estate, 3-10 per cent on bank stock, and $\frac{1}{2}$ per cent on all other personal property, is void, as under Const., art. 7, § 2, par. 1, providing that “all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed, within the territorial limits of the authority levying the tax,” all real and personal property within the corporate limits must be taxed according to its value. *Savannah v. Weed*, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270.

51. Savannah v. Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270. See post, “Method of Assessment,” § 329 (1).

an arbitrary classification violative of the inhibition in the state constitution forbidding such classification, or of the federal constitution which prohibits the passage of laws by the states which deny to any person within its jurisdiction the equal protection of the laws.⁵² The provision of the federal constitution does not prevent a classification of property for the purposes of taxation, but it requires that such classification be based on some distinction which bears a just relation to the purpose of the enactment.⁵³ The federal constitution does not confine the state to one system of taxation and different systems require different methods to adjust them to the general purpose of the law.⁵⁴ Diversity of taxation, both with respect to the amount imposed and the species selected for taxation or exemption, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of the terms.⁵⁵ Different systems, adjusted to the valuation of different kinds of property, may be adopted, and the method of collection may

52. Arbitrary classification—Equal protection of laws.—*State v. Farmers'*, etc., Sav. Bank, 114 Minn. 95, 130 N. W. 445, rehearing denied in 130 N. W. 851.

"In *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, 7 S. Ct. 350, that court stated that all persons subject to legislation, limited as to the objects to which it is directed, shall be treated alike under like circumstances and considerations, both in the privileges conferred and the limitations imposed. This declaration of the law corresponds to the rule of this court in determining a proper classification." *State v. Farmers'*, etc., Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851.

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf*, etc., R. Co. *v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255." *State v. Farmers'*, etc., Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851.

"In *Cotting v. Kansas City Stockyards*, 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30, an act of the legislature of Kansas was held invalid because it established a classification between stockyards doing a large business and those doing a small business. It was stated in the course of the opinion: 'Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every

kind.' But the inequality must be substantial, and affect a substantial right, and result in unequal burdens. *Merchants'*, etc., Bank *v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829." *State v. Farmers'*, etc., Sav. Bank, 114 Minn. 95, 130 N. W. 445, 851.

53. Classification not forbidden when based on distinction.—*Magoun v. Illinois*, etc., Sav. Bank, 170 U. S. 283, 42 L. Ed. 1039, 18 S. Ct. 594; *State v. Hoyt*, 71 Vt. 59, 43 Atl. 973; *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

P. S. 804-820, taxing interest-bearing national bank deposits to the depositors, is not unconstitutional as discriminating against depositors in national banks by singling them out and requiring them to pay a tax on a particular class of debts to be assessed at a different rate to be charged and paid at different times according to different methods than taxes imposed on other taxpayers with reference to other credits, nor was such act discriminatory against bank depositors whose deposits are not on interest, in that such deposits were left subject to taxation at the full local rate. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

54. Different systems of taxation.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 50 L. Ed. 744, 26 S. Ct. 459; *Bell's Gap R. Co. v. Commonwealth*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533.

55. Diversity of taxation permissible.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 12 S. Ct. 250.

be varied to suit the necessities of the case.⁵⁶ Equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation.⁵⁷ All that is required by the federal constitution is that one class be not deprived of a privilege enjoyed by others under the same condition.⁵⁸ It seems that there must be a reason for the classification. The law demands a substantial distinction between the objects placed in a class and those excluded.⁵⁹ Thus where savings banks enjoy peculiar advantages under the law, a statute drawn with reference to such advantages may be justified under the constitution as a reasonable classification.⁶⁰ Depositors in national banks and taxpayers under the general law are not in the same situation.⁶¹

Basis for Classification—Classification According to Use.—The use to which property is put may form a legitimate basis for classification.⁶² Although the object for which trust companies are organized may resemble in some feature that for which banks exist, yet these objects are not identical, and the differences permit a legislative discretion in classifying them as distinct.⁶³ On the same principal stock in the various classes of corporations may be differently assessed for taxes, in the discretion of the legislative department of the government.⁶⁴

Domestic and Foreign Corporations.—It is competent for the legislature to place domestic and foreign corporations in different classes for the purposes of taxation.⁶⁵

56. Systems adopted to suit kinds of property taxed.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

57. Equality does not mean indiscrimination.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *Magoun v. Illinois, etc., Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594.

58. Division by classes.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145, 5 S. Ct. 730.

59. Reason for classification.—*State v. Farmers', etc., Sav. Bank*, 114 Minn. 95, 130 N. W. 445, 851.

60. Peculiar advantages of savings banks as reason for classification.—*Laws 1907, c. 328* (Rev. Laws Supp. 1909, §§ 1038-25 to 1038-33), requiring savings banks to pay a registry mortgage tax upon mortgages owned by them, without exempting such mortgages from taxation otherwise, is not violative of Const., art. 9, § 1, providing that all taxes shall be as nearly equal as may be. *State v. Farmers', etc., Sav. Bank*, 114 Minn. 95, 130 N. W. 445, rehearing denied and judgment modified in 130 N. W. 851.

61. Depositors and tax payers under

general law.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

62. Basis for classification.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586; *State Board v. Central R. Co.*, 48 N. J. L. 146, 4 Atl. 578.

63. Difference in nature of institutions.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586.

"It would not, I presume, be contended that the act concerning trust companies (P. L. 1899, p. 450) is in its entirety unconstitutional; yet its permeating design is to confer corporate powers which can not constitutionally be done by special act, but only through general laws. Const. N. J. art. 4, § 7, par. 11. If this act is general, then the corporations formed under it stand in a class by themselves, and may be taxed differently from other corporations." *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586.

64. Classification of corporations.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586.

65. Comp. Laws 1897, § 3831, provides that, for the purpose of taxation, personal property shall include all goods and chattels belonging to inhabitants of Michigan, situated without

State Banks and National Banks Subjects of Different Classes.—

The fact that national banks and banks organized under the general laws of the state transact similar kinds of business does not show that they must be taxed according to the same plan.⁶⁶ National banks are organized and exist by virtue of acts of congress. They are instruments of the general government, designed to aid it in the administration of a branch of the public service.⁶⁷ The states can not exercise control over them, excepting with the consent of congress, expressed or implied, and the power of the states to tax them is derived from that source.⁶⁸ They are subject to limitations and regulations of power which have no application to state banks, and constitute a class of corporations which may be properly subjected to a plan of taxation different from that applied to state banks. The state banks constitute another class with distinct powers and privileges and subject to different restrictions, and may properly be subjected to a plan of taxation applicable only to that and similar classes.⁶⁹ However, it has been held that

the state, except such as are actually and permanently invested in business in another state, and shall include all shares in corporations organized under the laws of Michigan when the property of such corporation is not exempt, or is not taxable to itself, or when the personal property is not taxed, and all shares in foreign corporations, except national banks owned by citizens of Michigan. Held, that the act is not unconstitutional, as violating Const., art. 14, requiring uniformity of taxation, in that it places a tax on stock in foreign corporations when held by residents, which is taxed as capital stock in the state where the corporation was organized, and exempts from taxation stock in domestic corporations, the capital stock of which is taxed in Michigan, since it was competent for the legislature to place domestic corporations and foreign corporations in different classes for the purpose of taxation. *Bacon v. Board*, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524.

66. State banks and national banks subjects of different classes.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

67. Character of national banks.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

68. Right to tax national banks.—*Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *First Nat. Bank v. Albia*, 86 Iowa 28, 52 N. W. 334; *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

69. Grounds for classification.—*Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

Act March 11, 1867, which imposed on national banks a less rate of taxation than was imposed by the general law on state banks, was not, for that reason, unconstitutional; national banks having, under the law by which they were created, rights, duties, and privileges that do not belong to any bank chartered by the state. *Commonwealth v. Covington Nat. Bank*, 7 Ky. L. Rep. 41.

Acts 23d Gen. Assem. c. 39, § 1, providing that the capital stock of the state banks shall be assessed to the banks, and not to the individual shareholders, is in harmony with Const., art. 8, § 2, requiring all property to be equally burdened with taxation, and authorizing the legislature to adopt different methods of ascertaining values adapted to the various peculiarities of the property. *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

"The appellant insists that the case of *State Bank v. Board*, 91 Ala. 217, 8 So. 852, is in point, and an authority which the courts sustain. The opinion in that case is based upon provisions of the Alabama constitution which are not found in the constitution of this state, and upon the theory that 'the bank shares in a national bank and bank shares in a state bank belong to one species of moneyed capital,' and 'that any attempt to draw a distinction between them would be futile.' That theory, as we found, is not applicable under the laws of this state, and we do not think that the case is fairly in point." *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

"In *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196, § 2, art. 8, of the consti-

bank shares in a national bank and bank shares in a state bank belong to the same species of moneyed capital.⁷⁰

Shares of Resident and Nonresident Stockholders.—A difference in the method of assessment for shares of resident stockholders and non-resident stockholders may be justified by the difference in conditions. For such purposes the shares of residents and those of nonresidents may be placed in distinct classes, and the laws and rules applicable to each class would still be general and uniform.⁷¹

Classification According to Nature of Property—Uniformity of Rate.—Where a constitution provides that the property of private corporations, associations and individuals shall be taxed at the same rate, whenever the legislature levies a tax on a species of property, all property belonging to that species must be taxed at the same rate whether it belongs to an individual, an association of persons or to a private corporation.⁷²

Allowing Deductions to Certain Classes.—Taxpayers more heavily taxed under the general law may be allowed a reduction denied to those who take advantage of the opportunities afforded by a special act.⁷³

Two Modes and Rates—Permitting Election.—In some cases the law

tution of this state was considered, and its true meaning held to be 'that all property, whether owned by corporations or individuals, shall be equally burdened with taxation, and that the legislature may adopt different methods of ascertaining values, adapted to the various peculiarities of the property.' The statute in controversy is in harmony with that interpretation. By the method adopted for the taxation of shares of the capital stock of state banks, they are subject to the same rate of taxation as other property, and are required to bear their just share of the public burden, and no more." *Primghar State Bank v. Rerick*, 96 Iowa 238, 64 N. W. 801.

70. Shares in state and national bank.—*State Bank v. Board*, 91 Ala. 217, 8 So. 852.

71. P. L. 1866, p. 1078, § 16, providing for the taxation of shares of stock in banks, does not violate that provision of the state constitution which requires property to be assessed for taxes under general laws and by uniform rules. *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586, affirmed in 65 N. J. L. 549, 48 Atl. 582.

72. Uniformity of rate.—*State Bank v. Board*, 91 Ala. 217, 8 So. 852.

Code, § 453, subd. 8, provides for the taxing of the shares of any bank, banking company or association, and the same section allows the owner of shares in a national bank to deduct his indebtedness from their assessed value.

Held, that this deduction may likewise be made from shares in a state bank, for a discrimination between the two kinds of shares in this regard is in violation of Const., art. 11, §§ 1, 6, providing that taxes shall be assessed in exact proportion to the value of the property on which they are levied, and that the property of private corporations and individuals shall be taxed at the same rate. *State Bank v. Board*, 91 Ala. 217, 8 So. 852.

"We mean by this not only that in this record natural persons, individuals, or companies stand on the same footing with private corporations, but also that each individual, association, or private corporation is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length. *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570; *State Auditor v. Jackson*, 65 Ala. 142; *Maguire v. Board*, 71 Ala. 401. See, also, *National Commercial Bank v. Mobile*, 62 Ala. 284; *Sumter County v. National Bank*, 62 Ala. 464; *Perry County v. Selma, etc., R. Co.*, 65 Ala. 391; *Polard v. State*, 65 Ala. 628." *State Bank v. Board*, 91 Ala. 217, 8 So. 852.

73. Statute allowing reductions.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

furnishes two modes and rates for taxing the stock of national banks. This has been attacked for want of uniformity and inequality. The Pennsylvania law has been upheld on the ground that to induce banks to make their returns to the auditor general and to pay their taxes into the state treasury, the state might offer some inducement, by relieving from local taxation such bank as might elect to pay a certain rate per cent on their shares directly into the state treasury. All the banks may come into this class. The banks by not coming into this class are themselves responsible for the existence of the second class.⁷⁴

§ 325 (3) Double Taxation.—Double taxation is defined as the "requirement that one person or known subject of taxation shall directly contribute twice to the same burden while other subjects, belonging to the same class, are required to contribute but once."⁷⁵ It may be said that the authorities almost uniformly state the principal that, unless forbidden by constitutional provisions, double taxation does not render a tax void.⁷⁶ And the intent to levy a double tax must plainly appear; it will not be assumed.⁷⁷ The intent to impose taxation which is double even from an economic standpoint, is not to be ascribed to the legislature in the absence of clear unambiguous expression.⁷⁸ In some cases the state constitutions forbid double taxation.⁷⁹ While in other states no such inhibition exists and double taxa-

^{74.} Act June 8, 1891 (P. L. 240), providing that banks paying a certain rate on their shares of capital stock into the state treasury shall be exempt from local taxation, and that banks failing to do so shall be assessed, both locally and by the state, at a lower and uniform rate upon the appraised value of their shares, is not repugnant to Const., art. 9, § 1, which provides that all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax. *Commonwealth v. Merchants', etc., Nat. Bank*, 168 Pa. 309, 31 Atl. 1065.

^{75.} **Double taxation defined.**—*Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359.

Acts 1867, p. 216, providing for the taxation of stock in national banks, is not subject to the objection that it renders the owners liable to double taxation because the tax imposed where the bank is located, as under the general law such stock is not taxable at the place where the stockholder resides. *Strader v. Manville*, 33 Ind. 111.

^{76.} **Double taxation not forbidden except by constitution.**—*Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936; *State v. Branin*, 23 N. J. L. 484.

The taxation of a bank on stock of other corporations held by it, al-

though it may result in double taxes, is not invalid, since such taxation is not forbidden by the constitution. *Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

^{77.} *Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

^{78.} *Inhabitants v. Livermore Falls, etc., Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952; *First Nat. Bank v. Douglas County*, 124 Wis. 15, 102 N. W. 315; *County Comm'rs v. Bank*, 23 Minn. 280.

All presumptions are against such imposition. *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833, 6 S. Ct. 649.

While the tax statutes of the state explicitly subject the real estate of a bank to taxation to the bank, notwithstanding its shares are subjected to taxation. Rev. St., c. 9, § 5, does not specifically subject to such taxation shares of other banks owned by it, and it can not be held liable to taxation on such shares. *Inhabitants v. Livermore Falls, etc., Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

^{79.} **Double taxation forbidden.**—Const., art. 13, § 4, and Id. art. 12, § 3, providing that corporate property shall be taxed the same as property of individuals, prohibits double taxation

tion in some cases exists. Thus, in some cases the stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax on the same property.⁸⁰ Double taxation may, in its operation be unequal, oppressive and unjust, but, if so, the remedy is not with the court unless the organic law forbids it. The interest, wisdom and justice of the legislature, and its relations with its constituents furnish the only security where there is no express contract against unjust and excessive taxations as well as against unwise legislation in general.⁸¹

Construction of Statutes.—Tax statutes are to be construed strictly against the state, and especially are they to be so construed as to avoid double taxation unless their language, interpreted according to recognized principles of statutory interpretation, fairly compels a contrary construction.⁸²

What Constitutes Double Taxation.—The general rule seems to be that the fact that property assessed for taxes in some way represents an indebtedness which is also due to or by another person does not relieve it from the burden of taxation.⁸³ The shares of stock are the legal property of the stockholders, and although the value of the stock is founded upon and dependent upon the value of the property of the corporation, they are nevertheless, a species of property altogether separate and distinct in character and ownership from the capital or property of the bank.⁸⁴ The capital stock of a bank

of property of banks and corporations. *Cleveland Trust Co. v. Lander*, 62 O. St. 266, 56 N. E. 1036, affirmed in 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394.

80. *Fish v. Branin*, 23 N. J. L. 484.

81. **Remedy.**—*Fish v. Branin*, 23 N. J. L. 484; *Providence Bank v. Billings* (U. S.), 4 Pet. 514, 563, 7 L. Ed. 939; *McCulloch v. State* (U. S.), 4 Wheat. 316, 4 L. Ed. 579; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Smith v. Burley*, 9 N. H. 423.

82. **Construed to avoid double taxation.**—*Inhabitants v. Livermore Falls, etc., Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

83. **What constitutes double taxation.**—*Gerard v. Duncan*, 84 Miss. 731, 36 So. 1034, 66 L. R. A. 461.

The fact that creditors of an insolvent state bank, whose notes and solvent credits are taxed in the hands of an assignee, reside without the taxing district of the assignee, and have their proportion in the assets of the bank assessed to them on their individual assessments as "indebtedness probably collectable," would not constitute double taxation, rendering the assessment of the property to the assignee invalid. *Gerard v. Duncan*, 84 Miss. 731, 36 So. 1034, 66 L. R. A. 461.

Under Rev. Stat. 1909, § 11,357, providing that owners of shares of stock

in banks or insurance companies shall not be required to list the same for taxation, but that the corporation shall deliver to the assessor a list of all shares of stock held therein, and the value of real estate represented by such stock, together with all personal property owned by the corporation, and such shares and personal property shall be assessed at their true value less the value of the real estate, and in view of Const., art. 10, §§ 3, 4, providing for the uniformity of taxation, and that all property shall be taxed in proportion to its value, an insurance company should not be taxed upon shares of stock which it owns in banks, as that would, in effect, be double taxation. *Campbell v. Brinkop*, 238 Mo. 298, 143 S. W. 444.

84. **Shares of stock.**—*Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359.

A bank with a surplus of \$300,000 and a capital of \$200,000 reported to the assessor the true value of its shares of stock to be \$200 each, the face value being \$250. The assessor and board of review fixed the taxable value at \$450, and the stockholders paid the taxes assessed at such valuation. Much of the surplus was composed of real estate. Held, that taxes on such real estate were taxes on the surplus, and

and the shares of capital are distinct things, and both may be taxed. So also the franchise, the surplus earnings, and the real estate are things distinct from the capital stock and from each other, and the state may tax the bank under each of these heads without being guilty of imposing double taxation.⁸⁵ But it is held that to tax the capital stock of its full face value, when the stock is represented in whole or in part by real estate taxed separately, amounts to double taxation to the extent that the capital is invested in real estate.⁸⁶ The taxation of bank stock in the name of the holders at its actual market value, is not objectionable, as providing for double taxation, though the capital of the bank is largely represented by real estate which is also taxable.⁸⁷ It is well settled that the owner-

not on the capital stock; hence the taxation was not double. Second *Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359.

The court in the above case said: "The shareholders, as such, are not the owners of the capital or property of the bank, the title to which is vested in the bank itself. It can not therefore be said that the case presented is one of double taxation, either as to person or subject. *State Bank v. Milwaukee*, 18 Wis. 281; *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229; *Porter v. Rockford*, etc., R. Co., 76 Ill. 561; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456."

85. Taxation of capital stock, shares of capital, franchise, surplus, real estate, etc.—*Franklin County Court v. Deposit Bank*, 87 Ky. 370, 10 Ky. L. Rep. 506, 9 S. W. 212. See *Bradley v. People* (U. S.), 4 Wall. 459, 18 L. Ed. 483; *National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 19 L. Ed. 701.

86. Taxation of real estate and capital stock.—By Kirby's Dig., § 6920, a bank is required to make to the tax assessor a statement of the amount of its capital, the undivided profits, the value of moneys, etc., converted into securities, and the amount of loans and deposits. By § 6921, the amount of such sums added together shall be deemed the amount of money employed in banking. By Const. 1874, art. 16, § 5, all property is to be taxed according to its value. Under the general law the real estate of a bank is assessed in the township or ward where situated. Held, that a bank can not be assessed on that part of the capital stock invested in real estate, as such assessment would be double taxation. *Hempstead County v. Hempstead*

County Bank, 73 Ark. 515, 84 S. W. 715.

"Judge Cooley thus treats the subject: 'The same may be said of a tax on the property of a corporation, and also on the capital which is invested in the property. If the latter is taxed as property, this is also duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value, when on the same basis it is taxed as a part of his general property—when, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery.'" *Hempstead County v. Hempstead County Bank*, 73 Ark. 515, 84 S. W. 715.

To tax the property of a bank and its capital stock at the same time would be double taxation, which is forbidden by the organic law of Maryland. *Frederick County Comm'rs v. Farmers'*, etc., Nat. Bank, 48 Md. 117.

87. Taxation of shares of stock and real estate.—*Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926.

To assess the shares of the stock of a bank in the hands of the holders at its full value, and also to assess and tax the real estate of the bank, is not unconstitutional as double taxation. *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31, 66 N. E. 338.

"So, every debt secured by a mortgage on real estate may derive its entire value from the mortgage security, and yet no one ever supposed that the payment of taxes by the creditor upon the debt due him, as a solvent credit, released the mortgagor's land from taxation. The solvency of every credit is due to the ability of the debtor to pay, or the liability of his property to legal process." *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926.

ship of land by a corporation is entirely separate from the ownership of shareholders of stock in the corporation. The former is realty, the latter is personalty, under all circumstances.⁸⁸ To tax the shares of a corporation to the shareholders, and to tax at the same time the property of the corporation to the corporation itself, imposes in effect, if not in theory, a double tax burden on the shareholders.⁸⁹ To tax to the individual shareholders the

88. Ownership of shares and real estate separate.—Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926.

"The question has been fully considered and settled that the ownership of land by a corporation is entirely separate from the ownership of shareholders of stock in the corporation. The former is realty, the latter is personalty, under all circumstances." Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926.

89. Inhabitants *v.* Livermore Falls, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

"If the shares are severally taxed as such and the corporate assets are also taxed, the result is practically a double burden on the stockholder, or double taxation. The stockholders really pay both taxes. There are many authorities supporting this view. Thompson on Corporations, § 2813, and cases cited; Cook on Stockholders, § 567; Clark & Marshall on Corporations, pp. 754, 755, and note 59; 27 Am. & Eng. Ency. of Law, 949, par. 3, and cases cited; Gardiner Factory Co. *v.* Inhabitants, 5 Me. 133; Augusta Sav. Bank *v.* Augusta, 56 Me. 176; Sweet-sir *v.* Chandler, 98 Me. 145, 56 Atl. 584; Tennessee *v.* Whitworth, 117 U. S. 139, 29 L. Ed. 833, 6 S. Ct. 649; In re Newport Reading Room, 21 R. I. 440, 44 Atl. 511; Cheshire County Tel. Co. *v.* State, 63 N. H. 167; Salem Iron Factory Co. *v.* Danvers, 10 Mass. 514; Boston Water Power Co. *v.* Boston (Mass.), 9 Metc. 199; First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315; Commonwealth *v.* Bank, 118 Ky. 547, 26 Ky. L. Rep. 407, 81 S. W. 679; Stroh *v.* Detroit, 131 Mich. 109, 90 N. W. 1029." Inhabitants *v.* Livermore Falls, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

"Moreover, there are decided cases including banks within the doctrine that taxes upon the shares and also upon the assets of a corporation constitute double taxation. In First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315, the bank recovered back a tax levied upon its real es-

tate, the court assuming that it constituted double taxation not required by the statutes of Wisconsin." Inhabitants *v.* Livermore Falls, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

In Commonwealth *v.* Bank, 118 Ky. 547, 26 Ky. L. Rep. 407, 81 S. W. 679, the state sought to impose a tax on the notes, bonds, stocks, etc., owned by the bank, the shares of which were also taxed to the shareholders. The court held such a tax could not be imposed, and seems to assume that it was double and destructive taxation, citing another Kentucky case Louisville, etc., Mail Co. *v.* Barbour, 88 Ky. 73, 9 S. W. 516 where such a tax was directly held to be double taxation.

In Hempstead County *v.* Hempstead County Bank, 73 Ark. 515, 84 S. W. 715, it was held that to tax a bank first on all its net assets, and then on its real estate, was double taxation.

In Frederick County Comm'rs *v.* Farmers', etc., Nat. Bank, 48 Md. 117, it was held that to tax the property of a bank and its capital stock at the same time would be double taxation. The result would be the same whether the capital stock was taxed in solido to the bank or in shares to the shareholders.

In Cleveland Trust Co. *v.* Lander, 62 O. St. 266, 56 N. E. 1036, the shares of the bank were taxable to the shareholders. The bank in behalf of the shareholders sought to have the government bonds held by the bank deducted in fixing the taxable value of the shares. The court held that the shares were to be taxed at their value no matter what investments the bank made.

"The case of School Directors *v.* Carlisle Bank (Pa.), 9 Watts 289, seems precisely in point on this question. The bank owned, by purchase for investment, stock of the United States Bank of Pennsylvania. The shares of its own stock were taxable to the holders. The school directors sought to tax the bank for the shares of the United States Bank stock it owned. The court held that the bank

shares of a bank, and to tax at the same time the shares owned by it in other banks, imposed to that extent an extra burden on the shareholders of the bank so taxed.⁹⁰

Tax on Deposits to Bank Depositor.—Deposits in savings banks are not taxable to the bank and also to the depositors.⁹¹ Where depositors in savings banks are taxable for their deposits, the banks are not liable to be taxed for national bank stock or city bonds in which they have invested moneys received on deposit.⁹² The fact that mortgages held by savings banks represent deposits, and depositors are taxed, does not render the result produced by the taxation of the mortgages as real estate a double taxation, within the prohibition of the constitution.⁹³

Curative Statutes Amounting to Double Taxation.—Where an act of the legislature requires banks, which have not paid a franchise tax under a prior act, to be assessed on their stock for years subsequent to a certain date is retroactive and invalid when applied to banks which had accepted and paid taxes under the former act, since such amounts to imposing a double tax.⁹⁴

Inhibition Applies Only to State or Government.—The inhibition of double taxation applies only to such taxation in the same state or government. The fact that property is situated and taxable in a different form in another state does not make the domestic tax a double taxation.⁹⁵

could not be taxed for them, and this clearly upon the ground that it would be double taxation which the legislature could not have intended to impose. The court said (p. 292 of 8 Watts) that to impose the tax on the shares of the United States Bank owned by the Carlisle Bank 'would be literally taxing them (the stockholders of the Carlisle Bank) for the same property twice, which would seem to be the very height of injustice.' *Inhabitants v. Livermore Falls, etc., Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

90. Shares of shareholders and stock owned by corporation.—*Inhabitants v. Livermore Falls, etc., Co.*, 103 Me. 418, 69 Atl. 306, 15 L. R. A., N. S., 952.

91. Tax on deposit to bank and depositor.—*Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202; *Robinson v. Dover*, 59 N. H. 521.

92. Stocks and bonds representing deposits.—*Augusta Sav. Bank v. Augusta*, 56 Me. 176.

93. Mortgages representing deposits.—*Common Council v. Board*, 91 Mich. 78, 51 N. W. 787.

94. Retroactive statutes amounting to double taxation.—*Gen. St. Ky. 1886*, c. 92, art. 2, imposes a fixed tax for state purposes on each share of bank

stock, and provides that any bank which accepts its provisions, and pays the taxes thereby required, shall be exempt from all local taxation. Held, that Act March 21, 1900, requiring banks which had not paid franchise taxes under the Act of 1886 to be assessed on their stock for the years subsequent to 1892, was invalid as applied to banks which had accepted and paid taxes under the former act, since such provision would amount to imposing a double taxation. *First Nat. Bank v. Covington*, 103 Fed. 523.

95. Inhibition has only domestic application.—*San Francisco v. Fry*, 63 Cal. 470.

The Constitution requires all property not exempt under the federal laws to be taxed in proportion to its value to be ascertained as provided by law, and defines "property" as including corporate stock. *Pol. Code*, § 3627, requires taxable property to be assessed at its full cash value. Section 3608 provides that since stock has no intrinsic value above the actual value of the corporation's property, and the taxation of the stock and the property would be double taxation, corporate property, excepting that of national banks, etc., shall be taxed, but that stock except that of all national banks,

§ 325 (4) Taxation According to Value.—The organic laws of the states generally provide that all property subject to taxation shall be taxed in proportion to its value. However, perfect equality of taxation is impracticable, and much must be left to the legislatures as to the methods of ascertaining and equalizing the value of property.⁹⁶ But where a gross inequality provided for by statute, and clearly within the inhibition of the organic law, then such statute will be declared inoperative.⁹⁷ The fact that the state board has equalized the assessment of a county by raising the per centum to bring it to a uniform standard with all property of different counties of the state, thereby raising the assessment of an individual taxpayer who has returned money in the bank for assessment at its full value, is not a violation of the fundamental law requiring all persons to pay a tax in proportion to the value of his property.⁹⁸ It would not be taxation in proportion to value if property owned by a bank or insurance company were taxed twice in different forms when the same kind of property were only taxed once when held by an individual or a manufacturing company.^{98a} The constitutional provision that all property subject to taxation shall be taxed according to its value is complied with when the valuation is equalized

etc., shall not be. Held, that under these provisions stock held by citizens is taxable at full value to the extent that its value exceeds the value of the corporation's property taxed in the state; that property situated in another state is taxed there, not making taxation of the stock double, since the inhibition of double taxation applies only to such taxation in the same state or government. *Chesebrough v. San Francisco*, 153 Cal. 559, 96 Pac. 288.

96. Taxation according to value.—*Blocklock v. Board* (Mo.) 36 S. W. 1132; *Ward v. Board*, 135 Mo. 309, 36 S. W. 648; *Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255. See post, "Mode of Assessments," § 329 (1)

Act April 1, 1891, providing that the president of a bank shall deliver to the assessor a list of shares held therein, with the face value thereof, and a statement of all the reserve funds, undivided profits, premiums, or earnings, and all other values belonging to it, and such statement shall, for purposes of taxation, be treated as that amount of money, less the taxable value of the real estate and fixtures, subject to the right of the parties in interest to show the impairment of such shares before the board of equalization, does not violate Const., art. 10, § 4, providing that "all property subject to taxation shall be taxed according to its value," though *Rev. St. 1889*, § 7518, gives power to the board

of equalization to hear complaints and equalize the valuation and assessments on all real and personal property. *Ward v. Board*, 135 Mo. 309, 36 S. W. 648; *Blocklock v. Board* (Mo.), 36 S. W. 1132.

"To the state belong the sovereign power of taxation, and in the exercise of this power it has the right to provide, by proper legislation, means for arriving at the values of all taxable property, and for assessing and collecting the revenues, subject only to the limitations and restrictions provided for by the constitution. And, 'however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. Redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought.' *North Missouri R. Co. v. Maguire*, 49 Mo. 490." *Ward v. Board*, 135 Mo. 309, 36 S. W. 648.

97. Gross inequality—Statute to be declared inoperative.—*Ward v. Board*, 135 Mo. 309, 36 S. W. 648; *Blocklock v. Board* (Mo.), 36 S. W. 1132.

98. Action of state board in equalizing assessment.—*Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255.

98a. Double taxation.—*Campbell v. Brinkop*, 238 Mo. 298, 143 S. W. 444, See ante, "Double Taxation," § 325 (3).

with other property of the same kind in the county.⁹⁹

§ 325 (5) Method of Determining Value.—Under a constitution which provides for “a uniform and equal rate of assessment and taxation,” and does not require a uniform method of valuation of property, but only “such regulations as shall secure a just valuation, for taxation of all property, both real and personal, the legislature must use a discretion as to the best method of securing a just valuation, and unless the method adopted is clearly inadequate to secure that result its action can not be questioned.¹ Where a state constitution limits the rate of taxation in any one year, no tax having previously been imposed on national bank shares, an act of the legislature imposing such a tax and declaring that it should be operative during several preceding years as well as the current year, is, in practical effect, levying within that one year a tax in excess of the rate prescribed by the constitution and consequently void.² This question is distinguishable from what is known as escaped taxes. Such taxes have been properly levied and therefore the constitution does not prohibit the assessment and collection, which, it seems, may be provided for by retrospective legislation.³

§ 326. Liability of Banks and Their Property to Taxation—§ 326 (1) Of Banks Other than National—§ 326 (1a) In General.—Subjects of Federal Taxation.—Banks and bankers (other than national) were formerly taxed by the United States; 1. On their deposits. 2. On the capital employed in their business. 3. On their circulation. 4. On the notes of every person or state bank used and paid out for circulation.⁴ “Bankers”

99. What amounts to taxation according to value.—*Bank v. Hampton*, 92 Ark. 492, 123 S. W. 753.

1. Method of valuation.—*Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185. See post, “Mode of Assessment,” § 329(1).

The Act of March 15, 1867, which authorizes the collection of a tax on shares of capital stock owned in national banks located in the state, the listing and valuing of the stock to be made by an officer of the bank, is not in contravention of that section of the constitution, which requires “a uniform and equal rate of assessment and taxation.” *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185.

2. Tax in excess of rate prescribed.—Act Dec. 8, 1880, § 2, provides in regard to the taxation of shares in national banks, that there shall be assessed and collected on each share which has escaped taxation since 1874 the same rate of taxation as was in each year assessed on moneyed capital. Prior to such act such shares were not taxed. Held that, the act violated

Const., art. 11, §§ 4, 5, limiting the rate of taxation in any one year. *Maguire v. Board*, 71 Ala. 401.

3. Retrospective legislation for assessment and collection.—*Maguire v. Board*, 71 Ala. 401.

4. Subjects of federal taxation under former practice.—*Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558.

The Act of March 3, 1883, repealed the tax on capital and deposits, and left the tax on circulation at one-twelfth one per centum a month on average issue. See Fed. Stat. Anno., § 3408. See *Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640; *Twin City Bank v. Nebeker*, 167 U. S. 196, 42 L. Ed. 134, 17 S. Ct. 766.

For review of the legislation on the general subject of taxation of circulating notes other than national bank-notes, see *Hollister v. Zion's etc., Inst.*, 111 U. S. 62, 28 L. Ed. 352, 4 S. Ct. 263, followed in *Willis v. Belleville Nail Co.*, 111 U. S. 62, 28 L. Ed. 354, 4 S. Ct. 265.

But in view of the prohibitive ten per centum tax on the circulation of

who sell the federal securities no otherwise than for the United States and for themselves, and who, therefore, do not sell them for others or for a commission, were not liable to pay the duties imposed by the 99th section of the Internal Revenue Act, of June 30, 1864, imposed upon "brokers and bankers doing business as brokers."⁵

Liability of Bank's Property to State Taxation As in the Case of Property of Natural Persons.—The property of a bank corporation is the franchise, the capital invested, the undivided surplus earnings, and such other property, real or personal as the charter authorizes it to have; all of which is liable to taxation like the property of natural persons,⁶ unless it is

banks other than national, and the use of such circulation by (any) banks, this is all obsolete legislation as to state banks. See §§ 19, 20, 21 of the Act of Feb. 8, 1875, ch. 36, given in the Federal Statutes, Annotated, under § 3413.

The ten per cent tax so laid on bank and municipal circulation is constitutional. *National Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979; *Veazie Bank v. Fenno* (U. S.), 8 Wall. 533, 19 L. Ed. 482, 38 How. Prac. 147. See also, *Hollister v. Zion's, etc.*, Inst., 111 U. S. 62, 28 L. Ed. 352, 4 S. Ct. 263.

Only such notes as are in law negotiable, so as to carry title in their circulation from hand to hand, were the subjects of taxation under the statute (imposing the ten per centum tax). *Hollister v. Zion's, etc.*, Inst., 111 U. S. 62, 28 L. Ed. 352, 4 S. Ct. 263, following *United States v. Van Auken*, 96 U. S. 366, 24 L. Ed. 852.

5. License tax on bankers.—*United States v. Fisk*, 3 Wall. 445, 18 L. Ed. 243.

Although, under the Internal Revenue Act of June 30, 1864, as amended by the Act of March 3, 1865, the sales of stocks, bonds, and securities made by "brokers" for themselves were subject to the same duties as those made by them for others. *United States v. Cutting* (U. S.), 3 Wall. 441, 18 L. Ed. 241.

In *Warren v. Shook*, 91 U. S. 704, 23 L. Ed. 421, it was held that congress intended to impose the duty prescribed by § 99 upon bankers doing business as brokers, although a person, firm or company, having a license as a banker, might be exempted by subdivision nine of § 79 of the Act of 1864, as amended by the Act of March 3, 1865, 13 Stat. 472, from paying the special tax imposed upon brokers. Nothing more is decided in that case. *Richmond v. Blake*, 132 U. S. 592, 596, 33 L. Ed. 481, 10 S. Ct. 204.

6. Property of banks liable to taxation as is the property of natural persons.—*Dabney, etc., Co. v. Bank*, 3 S. C. 124.

The real and personal property of a state bank is to be assessed as are the same kinds of property belonging to natural persons. *Daly Bank, etc., Co. v. Silver Bow*, 33 Mont. 101, 81 Pac. 950.

Act Feb. 24, 1845, § 60, to incorporate the State Bank of Ohio and other banking companies, contains no pledge not to alter or change the mode or amount of taxation therein specified; but the taxing power of the general assembly over the property of companies formed under that act remains the same as over the property of individuals. And if it had contained such pledge, involving a surrender of the right of taxation, it would be inoperative for want of constitutional power, in the general assembly, to give it. *Debolt v. Ohio Life Ins., etc., Co.*, 1 O. St. 563.

The corporate property of a bank, being separable from the franchise, may be taxed, even though the franchise be exempt by contract or otherwise, unless there be a special agreement to the contrary. *Gordon v. Appeal Tax Court* (U. S.), 3 How. 133, 11 L. Ed. 529; *State Bank v. Knoop* (U. S.), 16 How. 369, 14 L. Ed. 977. See, also, *West River Bridge Co. v. Dix* (U. S.), 6 How. 507, 12 L. Ed. 535; *McCulloch v. Maryland* (U. S.), 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston* (U. S.), 2 Pet. 449, 7 L. Ed. 481; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

Association formed under the New York General Banking Law of 1838 are corporations, and, as such, are liable like other moneyed institutions to

otherwise agreed upon in the charter,⁷ or exempted by statute,⁸ during the period of its existence as a bank, and while transacting business as such.⁹

taxation on their property. *Bank v. Assessors* (N. Y.), 25 Wend. 686.

In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, Mr. Justice Swayne in delivering the opinion of the court, enumerated many objects liable to be taxed other than the capital stock of a corporation, and among them he instanced, (1) the franchise to be a corporation; (2) the accumulated earnings; (3) profits and dividends; (4) real estate belonging to the corporation and necessary for its business.

St. Feb. 9, 1836, § 19, incorporating the New Orleans Improvement & Banking Company, does not exempt from taxation real estate held by the company. The exemption extends only to its capital stock. In *re New Orleans, etc., Banking Co.*, 4 La. Ann. 471.

Laws 1866, c. 761, § 1, provides that the real estate held or owned by any bank shall not be exempt, but shall be subject to state, county, municipal, and other taxation to the same extent and rate and in the same manner as other real estate is taxed. A lease of a lot to a bank gave the lessor an option at the end of the terms to pay for a building erected thereon by the bank, or to renew the lease; the lessee, in case of renewal, to have the right to remove the building. The bank erected thereon a building for its own use, thus investing therein \$65,000 of its own capital. Held that, in assessing the stockholders, only the assessed value of the building should be deducted on account of the investment; that such value might be less than the cost of the building, but could not be more; and, accordingly, that an assessment of the lot and building together at \$70,000 must be modified by the assessing officers in order to determine the proportion for the building. *Van Nest v. Commissioners*, 80 N. Y. 573.

Under the Pennsylvania constitution, no corporate body in the state, with banking or discounting privileges, can obtain exemption from the imposition of taxes according to legislative discretion. *Iron City Bank v. Pittsburg*, 37 Pa. 340.

The fact that a corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks. *Main St. Sav. Bank,*

etc., Co. v. Hinton, 97 Cal. xvii, 32 Pac. 6.

7. *Dabney, etc., Co. v. Bank*, 3 S. C. 124.

When the charter of a bank is silent as to exemption from taxation of the dividends, stock, and assets of the bank, the same are taxable in their just proportion for public expenses. *Bank v. Commonwealth*, 19 Pa. 144.

A provision of a bank charter, that "said company" shall pay a stated annual tax "on each share of stock subscribed," in lieu of all other taxes, does not exempt the bank from general taxation on its capital. *Union, etc., Bank v. Memphis*, 101 Tenn. 154, 46 S. W. 557.

A bank's charter, providing that the bank's payment of 50 cents on each share of its capital stock shall be in full of all taxes or bonus, did not relieve the bank from liability to pay taxes on real estate held for profit and speculative advantage. *Farmers' Bank v. Henderson*, 7 Ky. L. Rep. 453.

8. See, generally, post, "Exemptions," § 327.

Act March 31, 1870 (P. L. 42; *Purd. Dig.*, p. 143), releasing from taxation the shares, capital, and profits of banks on payment of a tax of 1 per cent on the par value of all shares, does not exempt the real estate of such bank from taxation. *Farmers', etc., Nat. Bank v. Greene* (Pa.), 1 Chest. Co. Rep. 129.

1 Rev. St., p. 388, § 4, subd. 7, which exempts from taxation the personal property of every incorporated company not made liable to taxation on its "capital," applies only to corporations having a capital stock, and hence a savings bank having no capital stock is not within the statute. *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

9. **Duration and termination of liability to taxation.**—The revenue law of 1892 (Ky. St. 1903, § 4092) requires banks to make their reports on or before the 1st day of March of each year as of December 31st preceding. A bank subject to the provisions of the act was in existence and conducting business on December 31st and also on March 1st, but quit business in May. Held, that the bank was liable for taxes under the statute. *Bank v. Common-*

The assignees of a bank are bound, while the assets of such bank remain in their hands for administration, to discharge the taxes assessed upon it.¹⁰ All the assets of a bank, including specie and balance in other banks, must, if employed in any way whereby the bank obtains or reserves a per cent, premium, or profits, or a consideration, be averaged for taxation. But specie unemployed, not on hand for sale, and from which the bank derives no profit, etc., need not be returned to the assessor; and balances due from other banks, on which no interest, profit, or consideration is reserved or received, need not be returned.¹¹ A bank holding stock of other corporations, which it

wealth, 29 Ky. L. Rep. 643, 94 S. W. 620. Affirmed in 207 U. S. 258, 52 L. Ed. 197, 28 S. Ct. 82.

The tax of 1 per cent laid upon savings banks by Gen. Laws of New Hampshire, c. 65, § 8, is a property tax, and is not discontinued during the winding up in insolvency. *Bartlett v. Carter*, 59 N. H. 105.

A bank located in a village may be assessed for a village tax voted before it went into operation, if, before the assessment is made, it derives an income from its capital stock. *Oswego Bank v. Oswego Village* (N. Y.), 12 Wend. 544.

The tax upon savings banks, provided by St. 1872, c. 41, § 1, and amended by Laws 1875, c. 47, § 1, can not be recovered from the bank whose charter had previously expired by a decree of sequestration, passed before the return of the tax was made. *Jones v. Winthrop Sav. Bank*, 66 Me. 242.

A banking institution, permanently ceasing to transact its regular and appropriate business for the purpose of settling its affairs, and having called in for redemption 90 per cent of its circulating notes, is not liable for taxation as a bank during the period of six years after such redemption. *Metcalf v. Messenger* (N. Y.), 46 Barb. 325.

A trust company which was ordered by the superintendent of banks to receive no new deposits, but which continued to act as trustee with reference to existing trusts, renewed paper, paid depositors, made new loans, maintained its banking office, made its regular reports, and performed all its usual business, except to take new deposits, continued in business, and was subject to taxation. *People v. Holland Trust Co.*, 139 App. Div. 353, 123 N. Y. S. 935.

V. S. c. 31, § 583, requires a savings bank incorporated by the state doing business therein to pay an annual state tax. Held, that "doing business therein" applied to ordinary business for which it was incorporated, and did not ap-

ply to an insolvent savings bank in the hands of a receiver for the purpose of liquidation. *State v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 234, 44 Atl. 349.

V. S. c. 31, § 547, authorizes state taxation of savings banks, and § 584 requires the payment of such tax semi-annually. Held, that where a savings bank was closed by the inspector for insolvency, and thereafter did only such business as was necessary to liquidate its affairs, it was not liable for the payment of such taxes subsequently accruing, since such taxation was based, under § 584, on the average amount of its deposits. *State v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 234, 44 Atl. 349.

When by the assignment of its assets, pursuant to the statute, the Bank of Illinois was prevented from doing business as a bank, it was not bound to pay the bonus to the state in lieu of taxation as provided by the charter, and its assets became liable to taxation. *Ryan v. Gallatin*, 14 Ill. 78.

10. Liability of assignees for taxes assessed on bank.—*Ryan v. Gallatin*, 14 Ill. 78.

11. Taxation of assets.—*Stark County Bank v. McGregor*, 6 O. St. 45.

Cal. Const., art. 13, § 1, declares that all property in the state not exempt under the laws of the United States shall be taxed in proportion to value, and that the word "property" shall include all moneys, credits, etc., capable of private ownership. Pol. Code, § 3617, declares that the word "credits" shall mean "those solvent debts not secured by mortgage or trust deed, owing to the person or corporation assessed." Held, that where a foreign corporation maintained branch banks in San Francisco, Portland, Or., and Tacoma, Wash., credits on the books of the San Francisco office, consisting of sums paid to the other branches for their benefit, and charged to them as mere matter of bookkeeping, without any promise or obligation on the part of the debited agencies to return the money to the San Francisco bank, were

acquires in its business, is assessable for taxes thereon, though such corporations are located in the state, and their property is assessed and taxed therein.¹² By statute in some states banks of discount, deposit, and circulation, though taxable for their real estate, are not liable to be taxed for their personal property; all their property of this latter character being deemed to be represented by the shares of their capital stock, which are required by the act to be taxed to their stockholders in the towns where they reside; and there being nothing in the act to warrant double taxation of it.¹³ So, also, in some states it is held that the general assembly, in imposing a tax on property of an incorporated state bank, may tax either the property or the shares, but, if they materially differ in value, the tax must be on the shares.¹⁴ Under a statute requiring bank stock to be assessed in the names of the holders at its actual market value, the taxes to be paid by the bank, and further providing that nothing in the act shall exempt any property subject to taxation under other laws, the real estate of the bank is taxable, though the market value of the stock is based on the value of the real estate.¹⁵ State statutes, providing for the taxation of state and national

not credits arising in the state of California, or taxable therein. Judgment 117 Fed. 900, reversed. *London, etc., Bank v. Block*, 69 C. C. A. 136, 136 Fed. 138.

12. Stock in other corporations held by bank.—*Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936.

13. Statutes relieving banks from tax on personalty.—*American Bank v. Mumford*, 4 R. I. 478.

Under the Michigan tax law, providing that, except as to real estate, all taxation of state banks shall be against the shareholders, a savings bank is not liable to taxation, as a corporation, for its bank fixtures and surplus of property beyond its nominal capital stock, where its shareholders have been taxed upon their shares. *Lenawee County Sav. Bank v. Adrian*, 66 Mich. 273, 33 N. W. 304.

Marshall City Charter, § 287, provides that property shall be listed for taxation as prescribed in the charter and by the general laws regarding general state taxation which are applicable. Rev. St. 1895, art. 5079, provides a method under which all banks, bankers, brokers, or dealers in exchange other than national banks shall list certain personalty, and that other personalty than that mentioned and real estate shall be listed as other personalty and real estate. Article 5080 provides for the rendition of real estate owned by banks and bankers, and requires an officer of a bank to file with the assessor a sworn statement showing the number of shares of stock in the bank, the name and residence of

each shareholder, with the number and amount of the shares owned by him, and requires each shareholder to render at their actual value to the assessor all shares owned by him in such bank, and provides for the taxation of such shares. Held, that article 5080 operates to except incorporated state banks from the provisions of article 5079 in so far as that article provides a basis of assessing the personal property of such banks, and provides a means of taxing the personal property of state banking corporations in the hands of the shareholders, so that a state bank as a corporation is not liable for any taxes except those assessed against its real property, and an assessment against such a bank by the city of a personal tax on its stock, surplus, and undivided profits was unauthorized. *Marshall v. State Bank* (Tex. Civ. App.), 127 S. W. 1083.

14. Power to tax property or shares.—*Cleveland Trust Co. v. Lander*, 62 O. St. 266, 56 N. E. 1036, affirmed in 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394.

Under Ohio Rev. St., §§ 2764, 2766, 2769, providing a method for fixing the value of the shares of a bank for taxation, the shares are taxed, and not the property of the bank, except its real estate. *Cleveland Trust Co. v. Lander*, 62 O. St. 266, 56 N. E. 1036, affirmed in 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394.

15. Taxability of real estate though basis of market value of bank stock.—*Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926.

banks and "other institutions of loan and discount," have been held to refer only to incorporated institutions,¹⁶ and not to apply to private unincorporated banks, which are taxable under the general law.¹⁷ Such statutes have, however, usually though not universally, been held to embrace savings banks.¹⁸

§ 326 (1b) Franchises and Privileges.—A bank franchise or privilege, as property, is, according to its value liable to taxation for the support of government, whether paid for by a bonus or not.¹⁹ A round

16. State statutes relating to state taxation of banks held applicable only to incorporated institutions.—*Bolling Green v. Barclay*, 12 Ky. L. Rep. 676, 91 Ky. 66, 14 S. W. 968; *Commonwealth v. Fleming County Farmers' Bank*, 19 Ky. L. Rep. 266, 39 S. W. 1041.

17. Statute inapplicable to private unincorporated banks.—*Bolling Green v. Barclay*, 91 Ky. 66, 12 Ky. L. Rep. 676, 14 S. W. 968.

That defendant in an action to collect a franchise tax on a savings bank was not a savings bank, institution, or corporation organized for receiving deposits and paying interest thereon, was a meritorious defense, since Code Pub. Gen. Laws 1888, art. 81, § 86, imposing the franchise tax referred only to such banks and institutions. *State v. German Sav. Bank*, 103 Md. 196, 63 Atl. 481.

18. Taxation of savings banks under state statutes.—*Louisville Sav. Bank v. Commonwealth (Ky.)*, 14 B. Mon. 409; *Los Angeles v. State Loan, etc., Co.*, 109 Cal. 396, 42 Pac. 149.

Code Pub. Gen. Laws 1888, art. 81, § 86, imposing a franchise tax on every savings bank, institution, or corporation organized for receiving deposits of money and paying interest thereon, applies as well to savings banks having a capital stock subject to taxation as to savings banks having no capital stock. *Fidelity Sav. Bank v. State*, 103 Md. 206, 63 Atl. 484.

19. Taxation of franchises or privileges.—*Baltimore v. Baltimore, etc., R. Co. (Md.)*, 6 Gill. 288, 48 Am. Dec. 531. See, also, *Dabney, etc., Co. v. Bank*, 3 S. C. 124.

By the Tennessee Act April 7, 1881, and Act March 30, 1883, the privileges and franchises granted to savings banks and institutions are liable to taxation. *State v. Lincoln Sav. Bank*, 82 Tenn. (14 Lea) 42.

Under Ky. St., § 4077, providing that various corporations, including incorporated banks, "and every other like company, corporation or association,"

and Id., § 4082, providing that any person or association of persons, not being a corporation or having capital stock, engaged in the business of any of the corporations mentioned in § 4077, shall be deemed and treated as such corporations for the purpose of taxation, an unincorporated banking company must pay a tax upon its franchise. *Providence Banking Co. v. Webster*, 108 Ky. 527, 22 Ky. L. Rep. 214, 57 S. W. 14.

New York Laws 1866, c. 761, subjected to taxation the privileges and franchises of savings banks, the value of which was to be measured by their surplus earnings. Laws 1867, c. 861, amended the same by permitting the amount invested in United States securities to be deducted from the surplus. Laws 1875, c. 371, repealed both the first-named acts, and Laws 1882, c. 402, expressly repealed Laws 1875, c. 371, and Laws 1866, c. 761, but did not repeal Laws 1867, c. 861. Held, that the Act of 1882, repealing the Act of 1875, which repealed the Act of 1866 did not revive the last-named act as an independent statute, creating a tax on privileges and franchises, as the repeal of the Act of 1866, creating a tax, would carry with it an amendment conferring an exemption. *Newburgh Sav. Bank v. Peck*, 22 Misc. Rep. 477, 50 N. Y. S. 820, judgment affirmed, 32 App. Div. 624, 52 N. Y. S. 259, and 157 N. Y. 51, 51 N. E. 412.

A charter provision of a bank, that the "company shall pay the state an annual tax * * * on each share of stock subscribed, * * * in lieu of all other taxes," does not exempt it from payment of a privilege or occupation tax imposed by the city in which it is located. *Union, etc., Bank v. Memphis*, 101 Tenn. 154, 46 S. W. 557.

Const. Cal., art. 13, § 1, declares that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, and that the word "property," as there used, shall include, inter alia, franchises. Pol. Code Cal., § 3617, de-

sum or an annual charge, with or without reference to capital stock, may be asked by a legislature for a banking franchise. Such a contract is a limitation upon the taxable power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. Otherwise the franchise is corporate property and taxable as such.²⁰ State statutes which provide for the taxation of the "privileges and franchises" of savings banks manifestly have no application to foreign savings banks.²¹

§ 326 (1c) Capital and Stock—§ 326 (1ca) Capital.—The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed as they are for all other property, for the support of government,²² unless it is

clares that the term "property" shall include moneys, credits, bonds, stocks, franchises, and all other matters and things capable of private ownership. Held, that while the franchise of a foreign banking corporation, engaged in business in California, "to be" a corporation, was not taxable as a franchise, under such statutes, the corporation's franchise "to do business" in such state was taxable. *London, etc., Bank v. Block*, 117 Fed. 900, reversed in 69 C. C. A. 136, 136 Fed. 138.

A foreign banking corporation's right to do business in the state of California is taxable, under Const., art. 12, § 15, declaring that no corporation organized without the limits of the state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of the state. *London, etc., Bank v. Block*, 117 Fed. 900, reversed in 69 C. C. A. 136, 136 Fed. 138.

A city ordinance levying a tax for the fiscal year beginning May 1, 1893, on all taxable property in the city as of its value November 1, 1892, embraced the franchise of a bank, though the law authorizing the taxation of the franchises of banks did not become effective, and was not even passed, until November 11, 1892, and though no valuation thereof had been made at the date of the ordinance. *Middleboro v. Coal, etc., Bank*, 108 Ky. 680, 22 Ky. L. Rep. 380, 57 S. W. 497.

A "franchise tax" is a tax on the privilege of doing business under corporate organization. *State v. Clement Nat. Bank (Vt.)*, 78 Atl. 944.

When franchise tax becomes a subsisting debt against bank.—The tax upon savings banks, provided by the Maine St. 1872, c. 41, § 1, as finally

amended by Laws 1875, c. 47, § 1, is a tax upon the franchise of the bank, and first becomes a subsisting debt against the bank when the return of the average deposits therein required should be made. *Jones v. Winthrop Sav. Bank*, 66 Me. 242.

Where the capital and franchise of a bank are not subject to taxation, the assessment of a privilege tax is void. *State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

20. Gordon v. Appeal Tax Court (U. S.), 3 How. 133, 11 L. Ed. 529; Provident Ins. v. Massachusetts (U. S.), 6 Wall. 611, 18 L. Ed. 907; Society v. Coite (U. S.), 6 Wall. 594, 18 L. Ed. 897.

21. Statutes taxing franchise inapplicable to foreign banks.—*Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

22. Taxation of bank capital.—*Gordon v. Appeal Tax Court (U. S.), 3 How. 133, 11 L. Ed. 529; New Orleans v. People's Bank*, 27 La. Ann. 646. See, also, *Canal, etc., Co. v. New Orleans*, 99 U. S. 97, 25 L. Ed. 409.

There is no need of a statute specifically designating the capital of a bank for taxation. The capital of a bank is its property, and is liable to taxation, unless it is specifically exempted. *New Orleans v. People's Bank*, 27 La. Ann. 646.

The provision of the Banking Act of 1866 (page 129, c. 102, § 1), that no tax shall be assessed upon the capital of any bank, applies to the money or property contributed by the incorporators and transferred to the bank as capital. *First Nat. Bank v. Douglas*, 124 Wis. 15, 102 N. W. 315.

Under *McClain's St.*, p. 319, providing for the taxing of savings banks by assessing the "paid up capital," all money and moneyed assets resulting from payments on subscriptions and

specifically exempted.²³ It was formerly taxed by the United States, but

payments made on other obligations, where such payments are set apart and reserved as capital, were taxable. *Davenport Nat. Bank v. Board*, 64 Iowa 140, 19 N. W. 889.

Surplus moneys and credits of a savings bank are taxable as a part of "the paid up capital," under Acts 15th Gen. Assem. c. 60, § 28, providing that "the paid up capital of all savings banks" shall be subject to taxation. *Iowa State Sav. Bank v. Burlington*, 98 Iowa 737, 61 N. W. 851.

The capital of a bank which is subject to taxation, as capital, is made up of the balance of its assets remaining after deducting its debts, that portion of its assets exempt from taxation, and that portion which is taxed upon another name than capital. *New Orleans v. New Orleans Canal, etc., Co.*, 29 La. Ann. 851.

The assessment of a bank should be upon its capital, and not on its circulation. *Metcalf v. Messenger* (N. Y.), 46 Barb. 325.

Under a charter empowering a city to tax "capital," an ordinance imposing a tax on all property, real and personal, does not authorize taxing the capital of a bank paid in on its stock, without reference to its losses or gains in business. *City Bank v. Bogel*, 51 Tex. 355.

Associations formed under the general banking law of New York are corporations, within the meaning of 1 Rev. St., p. 414, § 1, and liable to taxation on their capital. *Bank v. Assessors* (N. Y.), 25 Wend. 686; *People v. Assessors* (N. Y.), 1 Hill 616; *Niagara County Sup'rs v. People* (N. Y.), 7 Hill 504.

Taxation of capital invested in real estate.—Laws 1866, c. 761, § 1, provides that the real estate held or owned by any bank shall not be exempt, but shall be subject to state, county, municipal and other taxation, to the same extent and rate and in the same manner as other real estate is taxed. A lease of a lot to a bank gave the lessor an option at the end of the term to pay for a building erected thereon by the bank or to renew the lease; the lessee in the case of renewal to have the right to remove the building. The bank erected thereon a building for its own use, thus investing therein \$65,000 of its own capital. Held, that the building was taxable to the bank as real estate. *Van Nest v. Commissioners*, 80 N. Y. 573.

23. *New Orleans v. People's Bank*, 27 La. Ann. 646.

By the charter of the Citizens' Bank of Louisiana the subscribers to the stock did not pay for their subscriptions in cash, but evidenced the amount thereof by interest-bearing notes payable in installments maturing many years ahead, the payment of which was secured by a mortgage on real estate and slaves. The working capital of the bank was procured by a loan from the state to the bank of its bonds, which were indorsed by the bank, and by it sold in open market. To secure the payment of these state bonds the bank pledged all the notes furnished by its stockholders for the amount of their stock subscriptions, as well as the mortgages securing them. Held, that the capital of the bank consisted of the money derived from the sale of the state bonds, and not from the subscriptions and stock mortgages by which they were secured, and therefore the mortgaged property bought in by the bank under foreclosure proceedings does not constitute a part of its capital, and a judgment that the capital is exempt from taxation is not conclusive as to the exemption of such real estate; nor did the fact that the charter authorized the subscribers to borrow from the bank on their stock a certain amount of the capital afforded by a sale of the bonds make the stock mortgages an investment of the capital. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, 17 S. Ct. 905.

While the ordinary deposits of United States currency (or national bank notes) in a bank, by its customers, enter into and form a part of its assets, they at the same time create liabilities of the bank, and thus offset themselves as assets. Such deposits therefore do not constitute a portion of the capital of a bank, and hence the bank can not claim that its capital shall be exempt from taxation to the amount of such deposit. *New Orleans v. New Orleans Canal, etc., Co.*, 29 La. Ann. 851.

United States currency and national bank notes belonging to a bank, although nontaxable, are a part of its assets, and in ascertaining the real amount of its taxable capital such currency and notes must be held as compensating the debt due depositors, and thus, pro tanto, extinguishing the liability of the bank. *New Orleans v.*

the law has been repealed.²⁴

§ 326 (1cb) Capital Stock.—In General.—The capital stock of a bank is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations, and is subject to taxation like other property,²⁵ where there is no express exemp-

New Orleans Canal, etc., Co., 29 La. Ann. 851.

In assessing the taxes for the city of New Orleans, a bank with the nominal capital of \$1,000,000 was assessed in addition to its real estate for the sum of \$700,000 as its capital or money at interest. It refused to pay the assessment, alleging that its capital not invested in real estate consisted of legal tender notes of the United States. Held that, the bank having failed to show that it had been unlawfully taxed, the assessment did not invalidate any constitutional right. Canal, etc., Co. v. New Orleans, 99 U. S. 97, 25 L. Ed. 409.

Under the decisions of the supreme court of the United States and of the supreme court of Tennessee, a provision in the charter of a bank granted by the state of Tennessee requiring the bank to pay to the state "an annual tax of one-half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes," does not exempt the bank from the assessment of ad valorem taxes on its capital, but applies only to the stock in the hands of its shareholders. Union, etc., Bank v. Memphis, 49 C. C. A. 455, 111 Fed. 561, reversed in 189 U. S. 71, 47 L. Ed. 712, 23 S. Ct. 604.

Where the assets of a bank, by deducting \$10,000 invested in nontaxable bonds, do not exceed \$75,000, the payment of the taxes prescribed for banks whose assets do not exceed such sum is not a compliance with the statute, since the nature of the property in which the assets are invested in no way affects the liability of the bank to taxation. Bank v. Oxford, 70 Miss. 504, 12 So. 203.

The capital stock of a bank is not liable to municipal taxation to defray the expense of a city subscription for railroad purposes; such stock being a liability for which the bank is indebted to its stockholders. Trustees v. Deposit Bank, 75 Ky. (12 Bush) 538.

24. Taxation by United States under former statute.—See Act of March 3, 1883, chap. 121, Rev. Stats., § 3408.

This statute did not apply to a person or corporation selling its own property, not that received from other

owners for sale. Selden v. Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249, distinguished in Richmond v. Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204.

Capital of a state bank was subject to the tax imposed by § 3408 of the U. S. Rev. Stats., though invested in foreign countries. Nevada Bank v. Sedgwick, 104 U. S. 111, 26 L. Ed. 703.

One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a "banker," within the meaning of Rev. St., §§ 3407, 3408 [U. S. Comp. St. 1901, pp. 2246, 2247], which provide that every person "having a place of business * * * where money is advanced or loaned on stocks, bonds," etc., "or where stocks, bonds," etc., "are received for discount or for sale, shall be regarded as a * * * banker," and impose a tax "on the capital employed by any person in the business of banking." Richmond v. Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204.

25. Capital stock of bank.—Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; Tennessee v. Whitworth, 117 U. S. 129, 29 L. Ed. 830, 6 S. Ct. 645; Providence Bank v. Billings (U. S.), 4 Pet. 514, 7 L. Ed. 939; New York v. Commissioners (U. S.), 2 Black 620, 17 L. Ed. 451, 25 How. Prac. 9; Nathan v. Louisiana (U. S.), 8 How. 73, 12 L. Ed. 992; Ohio Life Ins., etc., Co. v. Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; National Bank v. Commonwealth (U. S.), 9 Wall. 353, 19 L. Ed. 701; State Bank v. Milwaukee, 18 Wis. 281.

The taxable stock in the branch at Indianapolis of the State Bank of Indiana, owned and paid in by individuals, is liable for the tax contemplated by the act to provide for the further construction of the Madison & Indianapolis Railroad, approved February 15, 1841. State v. State Bank (Ind.), 6 Blackf. 349.

Where a bank charter expired a few days before the semiannual tax on its capital stock became due, but the bank

was empowered to close its concerns in its corporate capacity within a certain time, and, before the tax became due, half the capital stock was divided, it was held that the bank was liable for the tax on its whole stock which became due first after the charter was determined. *State v. Waldo Bank*, 20 Me. 470.

The Mississippi Code 1892, § 3758, provides that any bank or other joint-stock company, the capital stock of which is taxable, shall furnish the assessor a written statement of the stock paid in, and its market value, except such as is not liable to be taxed, and in default of such statement the entire authorized capital shall be assessed. Section 3750 provides that all incorporated banks, or other companies liable to taxation on their capital stock, shall be assessed for such stock in the county where the principal office is situated or the business is carried on. Held, that a charter provision declaring that "the real and personal property" of a corporation "shall be subject to the same taxes, to be assessed and collected in the same way, that the real and personal property of individual citizens is assessed and taxed, and not otherwise," does not exempt the capital stock from taxation. *District Attorney v. Simmons*, 70 Miss. 485, 12 So. 477.

Capital stock and shares of capital stock are two distinct things, separably taxable. *State Bank v. Richmond*, 79 Va. 113.

"Capital" and "capital stock" defined and distinguished.—The word "capital," as applied to the money of the corporation, may refer to the money paid in by the stockholders for the use of the corporations, and commonly known as the capital stock; but, in a wider and more popular sense, it includes all the money and other property of the corporation used in transacting its business. So long as the profits are not withdrawn from the business, they constitute part of the capital. *Iowa State Sav. Bank v. Burlington*, 98 Iowa 737, 61 N. W. 851.

"The words 'capital' and 'capital stock,' often used interchangeably, are found in tax laws to be applied to one or another of three different mental conceptions: First, to the shares or interest which the stockholders have in a corporation; secondly, to the money or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; and,

thirdly, the word is often used as a mere measure of size of the corporation as a test for graduating taxes, usually by way of license." *First Nat. Bank v. Douglas*, 124 Wis. 15, 102 N. W. 315.

Reference in Act No. 150 of 1890 to the capital and surplus of banks is simply for the purpose of classifying the banks, and graduating license under such classification. No tax is imposed on capital by the act. *State v. Citizens' Bank*, 52 La. Ann. 1086, 27 So. 709, reversed in *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346, 24 S. Ct. 181.

The "capital stock" of a bank, upon which, under the banking law of this state, a certain per cent is to be paid annually, in lieu of all other taxation, is the amount of funds paid in by the stockholders to be used by the banking association for banking purposes. *State Bank v. Milwaukee*, 18 Wis. 281.

The property of the bank subject to an ad valorem tax is such portion of the individual stock as has been paid in, and on account of which the stockholders are not indebted to the state. *State Bank v. Brackenridge* (Ind.), 7 Blackf. 395.

The term "capital," employed by a banker in the business of banking, in the one hundred and tenth section of the Revenue Act of July 13th, 1866, did not include moneys borrowed by him from time to time temporarily in the ordinary course of his business. It applied only to the property or moneys of the banker set apart from other uses and permanently invested in the business. *Bailey v. Clark* (U. S.), 21 Wall. 284, 22 L. Ed. 651.

Taxation on entire capital stock though not all paid in.—Under the charter of the town of Shelbyville, authorizing it to tax the capital stock of banks and other corporations doing business in the town, a trust company, organized to act as trustee, administrator, etc., can be taxed on its entire capital stock of \$50,000, though only \$5,000 of it is actually paid in. *Shelby County Trust Co. v. Shelbyville*, 91 Ky. 578, 13 Ky. L. Rep. 150, 16 S. W. 460.

The Act of April 29, 1863, for taxing moneyed corporations, should be construed as if it read, "All banks," etc., "shall be liable to taxation, on a valuation of their capital stock, equal to the amount of their capital stock paid in, or secured to be paid in," etc., that is, on the amount of their capital stock paid in, or secured to be paid in. *Peo-*

tion.²⁶

Exemption of Capital Invested in Exempt Securities.—The public securities of the United States, whether held by corporations or individ-

ple *v. Commissioners'* (N. Y.), 40 Barb. 334.

Liability of savings banks to tax.—The Revised Statutes impose a tax "on bank stock, or stock in any moneyed corporation of loan or discount." The savings institutions of Louisville have all the rights and privileges of the chartered banks of the state, except that of issuing their own paper as a circulating medium. They discount notes, loan money, and purchase bills of exchange. Held, that they are subject to the tax. *Louisville Sav. Bank v. Commonwealth* (Ky.), 14 B. Mon. 409.

The charter of a bank, which was not in fact a savings bank, although named such, required it to pay an annual tax on its capital stock. Subsequently it was allowed by the state officers to pay instead a tax on its surplus as a savings bank. Held, that it was still liable for the charter tax, and was entitled to a credit or deduction for the tax on its surplus erroneously received. *State v. Nashville Sav. Bank*, 84 Tenn. (16 Lea) 111.

Tax on discount business as tax on capital stock.—A tax assessed upon the discount business of a bank is to some extent a tax upon its capital stock. *Iron City Bank v. Pittsburgh*, 37 Pa. 340.

Facts held not to show increase of capital liable to additional taxation.—The Bank of Kentucky, having met with loss by fraudulent overissues of her certificates of stock, by the cashier of the Schuylkill Bank, was authorized to increase her capital stock \$1,000,000, and to recognize the certificates which had been overissued to the same amount. This was done, and stock purchased and withdrawn to the amount of \$1,266,400, but no cash was paid in on the new certificates, and, therefore, it was held that there was not such an increase of capital as rendered the bank liable to additional taxation. *Commonwealth v. Bank* (Ky.), 9 B. Mon. 1.

Effect of legislative reduction of shares of stock.—Under the statute of November, 1810, to tax bank stock, although the capital of the bank may have been diminished by losses, yet the tax must be paid upon the whole amount of the capital stock subscribed and paid in. But where the legislature reduces the shares of the stock

two-fifths, it is in effect declaring that the capital is reduced two-fifths, and the bank shall only pay tax on the remaining three-fifths. *Gordon v. New Brunswick Bank*, 6 N. J. L. 100.

After a resolution to dissolve and distribute its capital among its stockholders has been adopted by a banking company, and a dividend upon the capital stock has been made, and paid to the stockholders, and an equal amount of its stock surrendered and canceled, it is erroneous for the assessors to assess the association on its entire capital as it existed prior to the dissolution and the making of the dividend. *People v. Olmsted* (N. Y.), 45 Barb. 644.

26. An assessment on the capital stock and a tax against a bank, in violation of Laws 1866, c. 761, authorizing the taxation of stockholders of banks, and which prohibits the assessment of a tax on the capital stock, is void, as the assessment was without authority. *National Bank v. Elmira*, 53 N. Y. 49.

Where a savings bank has complied with Laws 1895, c. 108, § 1, providing that a savings bank shall pay to the state treasurer annually a tax of three-fourths of 1 per cent on the amount of the general deposits on which it pays interest, after deducting the value of all its real estate and of its loans secured by mortgage on real estate situated in the state, made at a rate not exceeding 5 per cent per annum, it is relieved from a further tax on bank stock which was purchased with a portion of the deposits. *Somersworth Sav. Bank v. Somersworth*, 68 N. H. 402, 44 Atl. 534.

Exemption from taxation for municipal purposes.—A bank as to its capital stock is not an "inhabitant" of any county, and therefore the capital is not to be taxed for county purposes under St. 1821. *Cherokee Ins., etc., Co. v. Justices*, 28 Ga. 121.

Bank stock is a liability of the bank to its stockholders, and the bank can not, therefore, be required to list it for taxation for county purposes. *Lincoln County Court v. National Bank*, 8 Ky. L. Rep. 139.

A city ordinance imposing a tax on the "capital stock" of banks located within the city was not in violation of Acts 1902-04, § 17, p. 163, providing that no tax shall be assessed on the

uals are exempt from taxation by the states for any purpose. Such immunity from state taxation not only exempts such securities from taxes levied directly on the holder of the same, but even where such securities form a part of the capital stock of a bank the rule is equally well established that a state can not tax such capital stock without deducting such portion thereof, as is made up of such public securities.²⁷ The burden of proof

"capital" of any bank. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

Where capital stock of a bank is not taxable for municipal purposes, the notes, etc., for which the original capital, as paid in, becomes exchanged in the course of business, remain capital stock in such a sense as not to be liable to taxation. *Connersville v. Bank*, 16 Ind. 105.

27. Exemption of capital invested in exempt securities.—*Bank Tax Case* (U. S.), 2 Wall. 200, 17 L. Ed. 793; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907; *New York v. Commissioners* (U. S.), 2 Black 620, 17 L. Ed. 451, 25 How. Prac. 9; *National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 19 L. Ed. 701; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324.

The amount paid for United States bonds purchased out of the general assets of a savings bank should be deducted from its taxable assets. *Ottumwa Sav. Bank v. Ottumwa*, 95 Iowa 176, 63 N. W. 672.

Corporations are entitled, when assessed under The Tax Act of March 28, 1862, to have deducted from the amount of their capital stock paid in, and accumulated surplus, the amount of the stock and public securities issued by the United States owned by them at the time of assessment. *Newark City Bank v. Assessor*, 30 N. J. L. 13.

Capital of a private banking firm, constantly absorbed in some form of government securities by resale and repurchase, held to be exempt from state and municipal taxation. *Chicago v. Lunt*, 52 Ill. 414; *State v. Rogers*, 79 Mo. 283.

A tax laid by a state on banks, "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and, when that property consists of stocks of the federal government, the law laying the tax is void. *Bank Tax Case* (U. S.), 2 Wall. 200, 17 L. Ed. 793; *Whitney v. Madison*, 23 Ind. 331.

When a franchise for banking is bought, the price is paid for the use

of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price. But whether the bonus for the franchise is paid by an annual tax upon the capital stock, or in any other way, it is in the discretion of the legislature to tax the capital stock as an aggregate according to its actual value, or the stockholders on account of their separate ownership of it, or the dividends in the aggregate, or the stockholders on account of their portions of them. *Gordon v. Appeal Tax Court* (U. S.), 3 How. 133, 11 L. Ed. 529. But see *People v. Commissioners*, 18 How. Prac. 245, in which it is held, that the capital stock of banking corporations which is invested in stocks of the United States is liable to taxation.

Where a bank purchased nontaxable government bonds, and by resolution provided that they should be held as a part of its capital stock, that fact did not entitle the bank to have the amount of the bonds deducted from its tax assessment or its "shares of stock" taxed as required by Code, § 1322, the bonds being a part of the capital of the bank, as distinguished from the shares of stock, which, under the statute, were taxable to the bank, instead of the shareholders. *German-American Sav. Bank v. Burlington*, 118 Iowa 84, 91 N. W. 829.

Nature of burden.—A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself. *New York v. Commissioners* (U. S.), 2 Black 620, 17 L. Ed. 451, 25 How. Prac. 9. See, however, *Bank Tax Case* (U. S.), 2 Wall. 200, 17 L. Ed. 793.

"That the tax upon the property of a bank in which United States securities are included is beyond the power of the state, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority." *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571. See *New*

of showing such investment is, however, on the bank.²⁸

§ 326 (1d) Share of Stock in Hands of Stockholders.—In General.—It is well established that shares of bank stock fall within the definition of property, and, as such, may be taxed in the hands of the shareholders.²⁹ The exemption of the capital of a banking corporation does not,

York *v. Commissioners* (U. S.), 2 Black 620, 17 L. Ed. 451, 25 How. Prac. 9.

28. Burden of proof showing such investment.—Canal, etc., Co. *v. New Orleans*, 99 U. S. 97, 25 L. Ed. 409.

29. Taxability of shares of stockholders.—*United States*.—New Orleans *v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, 17 S. Ct. 905; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571; *Brown v. French*, 80 Fed. 166; *People's Sav. Bank v. Layman*, 134 Fed. 635.

Iowa.—*Henkle v. Keota*, 68 Iowa 334, 27 N. W. 250.

Massachusetts.—*Revere v. Boston*, 123 Mass. 375.

Missouri.—*State v. Shryack*, 179 Mo. 424, 78 S. W. 808.

Montana.—*Daly Bank, etc., Co. v. Silver Bow*, 33 Mont. 101, 81 Pac. 950.
New Hampshire.—*Tucker v. Aiken*, 7 N. H. 113.

Ohio.—*Cleveland Trust Co. v. Lander*, 19 O. C. C. 271, 10 C. C. D. 452.

Tennessee.—*Union Bank v. State*, 17 Tenn. (9 Yerg.) 490.

Texas.—*Harrison v. Vines*, 46 Tex. 15.

Virginia.—*Stockholders v. Washington*, 88 Va. 293, 13 S. E. 407; *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

In *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830, 6 S. Ct. 645, Mr. Chief Justice Waite, in delivering the opinion of the court, says: "In corporations four elements of taxable value are sometimes found: First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders."

Shares in the capital stock of corporations in Ohio are not necessarily to be treated or regarded as portions of the capital of the corporation. They are property of the shareholders, distinct and separate from the property of the corporation itself. *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

Stock of a state bank or trust company falls within the definition of the term "property" as given in § 17 of art. 12 of the Montana constitution, and in § 3680, subds. 1 & 4 of the political code of that state, and are to be assessed to the owners at their full cash value, except to the extent that that value is represented in property which is assessed to the bank or trust company. *Daly Bank, etc., Co. v. Silver Bow*, 33 Mont. 101, 81 Pac. 950.

The provision of the state constitution that property must be assessed by uniform rules and according to its true value is not violated by the fact that bank shares are taxed, when all other classes of corporate shares are exempt, or that shares in the same bank are rated differently in different townships, if such inequality of valuation arises from accident or mistake, or even willful default of the assessor in the individual case, and not from any system of valuation designed to produce it. *Stratton v. Collins*, 43 N. J. L. 562.

Bank stock, as individual property, may be taxed when owned by residents of the state; but it must be taxed, and given in for taxation, like all other property, at its actual value, and must be listed for taxation in the county where the owner resides. *Union Bank v. State*, 17 Tenn. (9 Yerg.) 490.

In addition to the 12½ cents on each share of individual stock in the State Bank of Indiana, to be deducted from the dividends for the purposes of education, the stock liable to the ad valorem tax is subject to the same ratio of taxation to which other capital is subject, provided that the sum deducted from the dividends for education and the ad valorem tax do not, together, exceed 1 per centum. *State v. State Bank (Ind.)*, 6 Blackf. 349.

Under Code 1873, § 813, taxing the stock of corporations at its cash value, bank shares may be taxed in the hands of the owners thereof, since such shares are not specially exempt by statute, and § 801 provides that all property not so exempt is subject to

of necessity, include the exemption of the shareholders on their shares of stock,³⁰ and the fact that a part of the bank's assets which go to make up the value of the shares consists of bonds of the United States, which are not taxable, does not entitle the bank to a deduction of such amount.³¹ The

taxation. *Henkle v. Keota*, 68 Iowa 334, 27 N. W. 250.

An individual who subscribes for shares in a bank, and pays part of the amount of the capital, and conveys his shares to the bank to secure the residue, is liable to be taxed for the amount thus paid in, as the owner of bank stock. *Tucker v. Aiken*, 7 N. H. 113.

The legislature, by Acts 1835, cc. 13, 14, taxing bank stock generally, did not intend to tax the capital stock of the Planters' Bank or of the Union Bank. These acts contemplated a tax on bank stock only as the individual property of the stockholders. *Union Bank v. State*, 17 Tenn. (9 Yerg.) 490.

"Shares" or "stock" held synonymous.—Act June 3, 1873, relative to the taxation of bank stock, requires the assessment for taxation of "any shares or stock in any banking company or corporation." Held, that the words "shares" and "stock" as so used are synonymous. *Harrison v. Vines*, 46 Tex. 15.

Stock owned by nonresidents.—Stock in the name of, and owned by, nonresident stockholders, is not taxable to the bank. *Mechanics' Bank v. Thomas*, 26 N. J. L. 181.

Stock in banks incorporated by the state, and held and owned by nonresident stockholders, is not subject to the taxing power of the state. *Union Bank v. State*, 17 Tenn. (9 Yerg.) 490.

Under Acts 1883-84, § 17, p. 568, providing for a state tax on the assessed market value of the shares of banks located in the state, regardless of the residence of the stockholders, and Code, § 833, cl. 2, providing that the board of supervisors of each county shall order a levy on all property assessed with a state tax within the county, the board has power to levy a tax for county purposes on the shares of stock of a bank located in the county, although some of its stockholders are nonresidents of the state. *Stockholders v. Washington*, 88 Va. 293, 13 S. E. 407.

Statute taxing bank shares held not to apply to holders in representative capacity.—The Massachusetts statute, 1872, c. 231, regulating taxation of bank shares, construed not to apply to stockholders holding shares in a repre-

sentative capacity. *Revere v. Boston*, 123 Mass. 375.

Exemption from taxation for county purposes.—Shares of bank stock are not subject to taxation for county purposes. *Allegheny v. Shoenberger* (Pa.), 1 Grant Cas. 35.

Dividends not property of shareholder, or taxable until declared.—Rev. St., § 2746, provides that investments in bonds, stock, etc., shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, but no person shall be required to list for taxation shares of the capital stock of any company the capital stock of which is taxed in the name of such company; and 64 Ohio Laws, p. 204, provides that incorporated banks shall be exempt from taxation except on real estate, and declares that in lieu thereof the shares of stock held by the bank shall be taxed. Held, that dividends declared by a bank do not become the property of the shareholder until after they were declared, and hence they are not subject to taxation until that time. *Cleveland Trust Co. v. Lander*, 19 O. C. 271, 10 O. C. D. 452.

30. Bank's exemption does not exempt shareholders.—*New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, 17 S. Ct. 905; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456.

31. People's Sav. Bank v. Layman, 134 Fed. 635.

The shares of state banks may be taxed as the property of the shareholders, although a part of the bank's capital is invested in exempt securities, such as national securities, unless the tax is substantially on the bank. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571.

"Section 1322 of the Iowa Code provides that all shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located; but shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders. And the Iowa supreme court four times within the

capital stock of a banking corporation and the shares into which such stock may be divided and held by individual shareholders being two distinct pieces of property,³² such capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation.³³ In some jurisdictions, however, shares of stock in banks whose property is required by law to be returned for taxation by the president thereof are not taxable in the hands of the shareholders.³⁴ So, also, the statutes of some

last two years, and once within the last few weeks, has held that the general exemption from state taxation with which the bonds of the United States are clothed does not entitle the bank to deduct the amount of such bonds from the value of the shares of their stock which are assessed to it for the purpose of taxation under Code, § 1322. *German-American Sav. Bank v. Burlington*, 118 Iowa 84, 91 N. W. 829; *National State Bank v. Burlington*, 119 Iowa 696, 94 N. W. 234; *First Nat. Bank v. Independence*, 123 Iowa 482, 99 N. W. 142; *People's Sav. Bank v. Des Moines (Iowa)*, 101 N. W. 867. The Iowa supreme court, in the cases cited, relied upon the following by the supreme court of the United States: *Van Allen v. Assessors (U. S.)*, 3 Wall. 573, 18 L. Ed. 229; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324." *People's Sav. Bank v. Layman*, 134 Fed. 635.

Rev. St., § 2746, provides that investments in bonds, stock, etc., shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, but no person shall be required to list for taxation shares of the capital stock of any company, the capital stock of which is taxed in the name of such company; and 64 Ohio Laws, p. 204, provides that incorporated banks shall be exempt from taxation except on real estate, and declares that in lieu thereof the shares of stock held by the bank shall be taxed. Held, that shares of stock in an incorporated bank, whether state or national, are taxable at their money value, though all or a portion of the capital of the bank is invested in United States bonds. *Cleveland Trust Co. v. Lander*, 19 O. C. C. 271, 10 O. C. D. 452.

32. Capital stock and shares of such stock distinct properties.—Per Peckum, J. in *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456. See, also,

Owensboro Nat. Bank v. Owensboro, 175 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

33. Taxation of stock and shares of stock not objectionable as double taxation.—Per Peckum, J. in *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456. See, also, *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Van Allen v. Assessors (U. S.)*, 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners (U. S.)*, 4 Wall. 244, 18 L. Ed. 344; *State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

A tax on shares of stock is not a tax on the capital of a bank, and the bank has no right to deduct its capital from the stockholders' capital to determine the amount taxable. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Under Tax Law, § 13, providing that bank stockholders shall be taxed on the value of their shares, and there being no exception to the rule elsewhere in the tax law, it is proper to tax the shares of a bank, irrespective of the fact that its assets consist in part of railway shares, also taxable. *Englis v. Feitner*, 30 Misc. Rep. 215, 63 N. Y. S. 464.

34. Exemption from taxation where bank's property required to be returned for taxation by its president.—*Atlanta v. Bankers Financing Co.*, 130 Ga. 534, 61 S. E. 122.

Under Rev. St., art. 4682, exempting corporation stock from taxation against the owner when the capital and property of the corporation are required to be taxed, the owner of stock in a state bank is not taxable, while the property of the bank is, under the law, taxable, although the bank does not return its property for taxation, as it should do. *Gillespie v. Gaston*, 67 Tex. 599, 4 S. W. 248.

"To the extent that the capital stock is represented by property belonging to the state bank or trust company, and which property is liable to taxation, to that extent the stock of that

states enable banks to exempt their shareholders from all other taxation, by collecting a certain per cent upon the par value of all shares and paying the same into the state treasury.³⁵

Validity of Statutes Requiring Payment of Tax by Bank.—It is clearly within the power of the state legislature to provide, as is done in a number of jurisdictions, that the taxes assessed on shares of bank stock shall be paid by the banks,³⁶ and that they may recover from the owners of

bank or trust company is not taxable." *Daly Bank, etc., Co. v. Silver Bow*, 33 Mont. 101, 81 Pac. 950.

Rev. St., par. Ariz. 2633, provides for taxing the property of corporations. Laws 1897, Act No. 51, provides for taxing shares of stock of banks. Held, that this did not provide for double taxation as to banks, but simply for a different method of taxation from other corporations. *Western, etc., Banking Co. v. Murray*, 6 Ariz. 215, 56 Pac. 728.

35. Payment by bank as exempting shareholders from other taxation.—Act June 7, 1879, which enables a bank to exempt its shareholders from all other taxation, by collecting six-tenths of 1 per cent upon the par value of all the shares, and paying the same into the state treasury, being intended to take effect immediately, included the year of its passage, though some of the banks had already paid a higher tax under the old law. *Appeal of Truby*, 96 Pa. 52.

36. United States.—*Citizens' Bank v. Board*, 54 Fed. 73; *Brown v. French*, 80 Fed. 166; *Central Nat. Bank v. United States*, 137 U. S. 355, 34 L. Ed. 703, 11 S. Ct. 126; *Stapylton v. Thaggard*, 33 C. C. A. 353, 91 Fed. 93; *Boston v. Beal*, 51 Fed. 306.

Iowa.—*State Exch. Bank v. Parkersburg*, 112 Iowa 104, 83 N. W. 793.

Kentucky.—*Hager v. Citizens' Nat. Bank*, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

Missouri.—*State v. Shryack*, 179 Mo. 424, 78 S. W. 808; *State v. First Nat. Bank*, 180 Mo. 717, 79 S. W. 943; *Stanberry v. Jordan*, 145 Mo. 371, 46 S. W. 1093; *Mahan v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

Nebraska.—*State v. Fleming*, 70 Neb. 523, 97 N. W. 1063.

New York.—*National Copper Bank v. Wells*, 58 Misc. Rep. 252, 110 N. Y. S. 829; *Schaeffler v. Barker*, 87 Hun 194, 33 N. Y. S. 1042.

Ohio.—*Cleveland Trust Co. v. Lander*, 19 O. C. C. 271, 10 O. C. D. 452.

Virginia.—*Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Washington.—*Jefferson v. First Nat. Bank*, 38 Wash. 255, 80 Pac. 449.

As to payment by national banks of tax as agent of its stockholders, see post, "Validity of Statute Requiring Payment by Bank as Agent of Stockholders," § 326 (2bcd).

A bank may be required to pay taxes imposed upon the shares of its stock, having a right to enforce reimbursement from the shareholders. *Hager v. Citizens' Nat. Bank*, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

Under authority to levy a tax on the stock of a bank, the tax may be collected from the bank, instead of the individual stockholders, since many of them may be nonresidents, and Acts 1883-84, p. 568, § 17, makes the place where the bank is located the situs of its stock for the purposes of taxation. *Union Bank v. Richmond*, 94 Va. 316, 26 S. E. 821.

Nebraska.—Sess. Laws 1903, c. 73, is not objectionable in that it makes a bank responsible for the tax levied on shares of stock held by its stockholders, or an agent for the tax levied on the property of his principal. *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063.

Sess. Laws 1903, c. 73, § 56, providing that the accounting officer of every bank or investment company shall make a yearly statement under oath of the shares of the capital stock, with the names of the stockholders and the value of said shares, and deliver it to the assessor, is a provision, not for the taxing of corporations therein named on their capital stock, but for taxing the shareholders on the value of the stock held by them, and requiring the corporation to pay the tax assessed against the shareholders. *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063.

Where shares of a banking association are assessed under Tax Law, Laws 1896, p. 806, c. 908, § 24, it is a property tax, and the bank is not entitled to have it reduced because it has only enjoyed the benefit of government protection for a portion of the year. *National Copper Bank v. Wells*, 58 Misc. Rep. 252, 110 N. Y. S. 829.

Where state bank stockholders de-

such shares the amount so paid by him, or deduct the same from the dividends accruing on such shares;³⁷ and that the amount so paid shall be a lien

posited a sum equal to the face value of the stock held at the time of organization, and certificates of deposit were issued to such stockholders, among whom there was an oral agreement that the deposits should not be withdrawn, but, in case of a sale of stock, should pass to the purchasers, to whom new certificates of stock should issue, which agreement was observed, and the stockholders' certificates were in terms payable on surrender, and bore an indorsement, "Nonnegotiable," such deposits were properly assessed to the bank, under Code, § 1322, providing that shares of stock in state banks shall be taxed to such banks. *State Exch. Bank v. Parkersburg*, 112 Iowa 104, 83 N. W. 793.

Pierce's Code, § 8613 (Ballinger's Ann. Codes & St., § 1677), requires the stock of a bank to be assessed to its owners; §§ 8614, 8615 provide that the bank shall pay the taxes, and may have a lien on the stock therefor; and § 8593 entitles every shareholder to deduct his indebtedness from the gross amount of his credits, in determining the net amount for which he shall be assessed. Held, that an assessment of bank stock made to the bank, instead of to the stockholders, by which the latter were prevented from offsetting indebtedness, was void. *Jefferson v. First Nat. Bank*, 38 Wash. 255, 80 Pac. 449.

Sess. Acts 1863-64, p. 65, providing for taxation of shares of stock in banks and other incorporated companies, and of property owned by incorporated companies over and above their capital stock, makes a distinction between the liability to taxation of the property of a corporation embraced within its capital stock and of the shares of such stock; but in either case, if the officers of the corporation pay the tax, they pay it for the shareholders. *St. Louis Mut. Life Ins. Co. v. Charles*, 47 Mo. 462.

Issuance of warrant by county treasurer in case of failure to pay.—The statutes of Kansas in relation to taxation impose upon national banks the duty of paying the tax assessed against the shareholders therein, and authorize the treasurer of the county where the bank is situated to issue warrant therefor in case of the failure of the bank to pay. *Lyman v. First Nat. Bank*, 6

Kan. App. 74, 49 Pac. 639, reversed in *First Nat. Bank v. Lyman*, 59 Kan. 410, 53 Pac. 125.

Duty of cashier to pay an official and not a personal obligation.—Tax Law 1889, § 33, providing that on demand being made by the treasurer on the cashier of any bank for the payment of any tax assessed on the shares of its capital stock it shall be the duty of the cashier to pay said tax and charge the same against the shares of stock so assessed, imposes on the cashier an official, and not a personal, obligation. *Muskegon v. Lange*, 104 Mich. 19, 62 N. W. 158.

Evidence held to show payment from money belonging to stockholders.—In an action to recover money paid to defendant for taxes levied on bank stock owned by plaintiff, it appeared that the payment was made by the bank. The cashier testified that the bank always paid personal taxes on the shares of such of the stockholders as were liable to taxation, giving one check for the total amount, and to those stockholders who were not subject to taxation a proportionate amount was remitted, called a "tax dividend," so that the amount paid each year was equalized to the stockholders. Held, that such payment by the bank was from moneys belonging to the stockholders. *Ætna Ins. Co. v. New York*, 7 App. Div. 145, 40 N. Y. S. 120.

37. *State v. Shryack*, 179 Mo. 424, 78 S. W. 808.

The imposition of a tax on the shares of the bank according to the Louisiana statute, which requires the bank to pay the tax, and then look to dividends and to the stockholders for reimbursement, is a tax on the bank itself. *Citizens' Bank v. Board*, 54 Fed. 73.

Acts of Indiana 1907, c. 281, which provides in sections 1, 3, and 5 that the shares of capital stock of any bank shall be assessed to the owners thereof, and that the bank shall retain so much of any dividend sufficient to pay the taxes assessed on such stock, etc., by implication repeals Acts of 1903, c. 29, § 10 (*Burns' Ann. St. 1908*, § 10,214), providing that taxes assessed upon the shares of stock of a bank shall be paid by the bank in the same manner that other individuals pay their taxes, etc., and the appearance of this previous

on the shares respectively and shall be paid before a transfer thereof can be made.³⁸ Under a statute requiring banks to pay taxes assessed on their stock, and entitling them to deduct such taxes from dividends or to enforce a statutory lien against the stock therefor, no resolution of the bank's board of directors is necessary to entitle it to pay taxes assessed on its stock and to deduct the same from dividends.³⁹ A state statute requiring banks to pay the taxes assessed against their stockholders on their shares, and giving the bank a lien thereon for the amount advanced, is based on the theory that the bank holds assets of the stockholder from which it can protect itself; and such payment can not be enforced against the receiver of an insolvent national bank, nor against its assets in his hands.⁴⁰ So, also, it has been held

act in *Burns' Ann. St.* gives it no force. *Klauss v. Citizens' Nat. Bank*, 46 Ind. App. 683, 93 N. E. 558.

Rev. St. of Missouri 1879, § 6692, provides that persons owning shares of stock in banks need not deliver to the assessor a list thereof, but the president or other chief officer shall, under oath, give the assessor a list of all shares of stock, and the names of the holders, and state the actual cash value of such stock, and the property of such corporation. Section 6693 provides that the taxes assessed "on shares of stock" embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, etc. Held, that taxes should be levied against the shares of stock of a banking corporation, and not against the property which the shares represent, and a shareholder is not liable for taxes assessed against the property. *Gracy v. Catron*, 118 Mo. 280, 24 S. W. 439.

38. *State v. Shryack*, 179 Mo. 424, 78 S. W. 808.

Laws 1882, c. 409, as amended by Laws 1892, c. 714, provides (§ 313) that every bank shall, in December of each year, furnish taxing officers with a list of its stockholders, and that the names appearing on such list shall be deemed the owners of the shares, for the purpose of assessment. Section 314 provides that the tax on such shares shall be a lien from the time of the assessment, and that a transfer of the shares after such time shall be subject to the lien. Section 315 makes it the duty of the bank to pay the taxes on the shares out of the dividends. Held, that an assessment of bank stock in the name of the person appearing on the list is valid, as against the real owner, to whom the shares were transferred before the assessment was made, as an assessment in the name of the person appearing on the list as owner is, in

effect, an assessment on the shares, against whoever owned them at the time of the assessment. *Schaeffer v. Barker*, 87 Hun 194, 33 N. Y. S. 1042.

The lien of a bank on shares of stock for reimbursement for taxes paid thereon attaches to the stock and its earnings, irrespective of any transfer of the stock. *Shainwald v. First Nat. Bank*, 18 Idaho 372, 109 Pac. 257.

Where a bank pays the taxes on stock owned by its stockholders, it can not charge the same up against the aggregate earnings of the bank, but must charge it against the shares on which the payment was made. *Shainwald v. First Nat. Bank*, 18 Idaho 372, 109 Pac. 257.

Where a stockholder in a bank sold his shares after the date on which the taxes attached and prior to the payment by the bank, it can not thereafter pay over the dividends on such stock to the purchaser, and maintain a personal action against the vendor for recovery of the taxes so paid after the sale. *Shainwald v. First Nat. Bank*, 18 Idaho 372, 109 Pac. 257.

39. Resolution of directors unnecessary.—*Kennedy v. Citizens' Nat. Bank*, 128 Iowa 561, 104 N. W. 1021.

40. Payment not enforceable against receiver of insolvent national bank.—*Stapylton v. Thaggard*, 33 C. C. A. 353, 91 Fed. 93.

Pub. St. Mass., c. 13, §§ 8-10, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. Held, that a suit for this tax can not be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared. *Boston v. Beal*, 5 C. C. A. 26, 55 Fed. 26, affirming 51 Fed. 306.

that a bank can not be compelled to use its assets to pay a tax on certain shares of its stock, where it can not reimburse itself against the stock, as provided by law.⁴¹ In at least one jurisdiction it has been held that under an act taxing a bank on the shares of its stock, such tax was payable out of the common funds of the bank.⁴² Where a state statute taxing bank stock requires the bank to pay such tax out of the dividends on the stock, and a federal statute taxes all dividends declared by such banks, the bank can not omit to return the part of the dividends so paid for state taxes, but is taxable on the whole dividend.⁴³

§ 326 (1e) Dividends, Surplus and Undivided Profits.—Dividends.—A state may impose a tax of a certain per cent on the dividends declared by a bank,⁴⁴ within the limits set by the charter of such

41. Payment can not be compelled from bank's assets where latter can not reimburse itself.—*St. John's Nat. Bank v. Bingham*, 113 Mich. 203, 71 N. W. 588.

Shares of bank stock being assessable for taxation to the individual shareholder, and the bank not being liable for the taxes, it could not properly pay the same, except from dividends or other property of the stockholders in its possession. *Redhead v. Iowa Nat. Bank*, 127 Iowa 572, 103 N. W. 796.

Under Iowa Laws 1868, c. 153, to render a national bank, organized under the National Banking Law, liable for the payment of taxes due from its shareholders, it must be averred and shown that the bank now has or has had in its possession dividends or other money or property belonging to the delinquent shareholder. The bank is not absolutely liable, independent of such showing; the rule herein differing from that under the Kentucky statute. *Hershire v. First Nat. Bank*, 35 Iowa 272.

Under Code 1873, § 819, providing that banks shall be liable for the tax on shares of capital stock as the agent of the shareholders, and that they "shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied on his shares," a bank is not liable unless it has money or property belonging to the delinquent shareholder. *Farmers', etc., Nat. Bank v. Hoffmann*, 93 Iowa 119, 61 N. W. 418.

Evidence that a bank had not declared a dividend for a year previous to the levy of an assessment on its capital stock, and that the surplus which it reported after the assessment was made was worthless, by reason of the shrinkage of the securities compos-

ing it, will sustain a finding that, after the assessment, the bank had no money of the shareholder with which to pay the tax. *Farmers', etc., Nat. Bank v. Hoffmann*, 93 Iowa 119, 61 N. W. 418.

42. Payment from common funds of bank.—By an act of the legislature relative to the "Bank of Newbern," it was provided that a "tax of 1 per cent per annum" should be levied on "all stock holden in the bank, except on stock holden by the state," which should be "paid to the treasurer of the state by the president or cashier of the bank," etc. Held, that the tax was payable out of the common funds of the bank, instead of the shares of the profits belonging to the holders of the stock. *Attorney General v. Bank*, 21 N. C. 216.

Under the Act of 1833 chartering the Bank of Cape Fear, the tax of "25 cents on each share of stock owned by individuals" is payable out of the general funds of the bank; the state not being entitled to any exemption from such tax in the distribution of the dividends. *Attorney General v. Bank*, 40 N. C. 71.

43. Tax paid by bank on shares of stock not deducted.—*Central Nat. Bank v. United States*, 137 U. S. 355, 34 L. Ed. 703, 11 S. Ct. 126.

44. Taxation of percentage on dividends.—*State v. Commercial Bank*, 7 O. 125; *State v. Franklin Bank*, 10 O. 91; *State v. Farmers' Bank*, 11 O. 94; *Allegheny v. Shoenberger (Pa.)*, 1 Grant Cas. 35.

When the profits of a bank are applied in payment of stock, the profits so applied are subject to the tax imposed by the Ohio Act of March 12, 1831 on dividends. *State v. Farmers' Bank*, 11 O. 94.

The only mode of taxing bank stock is that prescribed by Act 1850, § 21, im-

bank.⁴⁵ Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself may make or lose in lending their money, but receive a share of such profits as the bank, by lending their money, may, after deducting expenses, etc., find that it has made, such share of profits is a "dividend" within meaning of the International Revenue Act of 1864, as amended by the Act of 1866, and not "interest," and is taxable thereunder.⁴⁶

Surplus and Undivided Profits.—It would seem to be well established that the surplus and undivided profits of a bank are subject to taxation,⁴⁷

posing a tax on dividends only. *Allegheny v. Shoenberger* (Pa.), 1 Grant Cas. 35.

Where new stock in a bank is created and sold at a premium, such premium is the property of the stockholders, and a dividend of the same among the old stockholders is not a dividend within the meaning of St. 1831, taxing dividends of banks. *State v. Franklin Bank*, 10 O. 91.

Where a tax upon bank dividends, actually declared, is properly laid, the creditors of the bank can not dispute it collaterally, though the bank was insolvent at the time, and the dividend a fraud upon stockholders and creditors. *In re Pennsylvania Bank Assignees' Account*, 39 Pa. 103.

A tax on the dividends arising from stock in the United States Bank, owned by citizens of a state by whose authority the tax is assessed, is constitutional. *State v. Tax Collector* (S. C.), 2 Bailey 654.

45. By the charter of the Commercial Bank of Cincinnati, no tax of more than 4 per cent on the dividends can be levied on the bank or its business. *State v. Commercial Bank*, 7 O. 125.

By the act under which defendant bank was chartered, it was required to pay a tax on dividends declared of 8 per cent. Its charter had three years to run when a general law (Act April 1, 1835) was passed, taxing dividends of all banks at a graduated rate according to the rate of the dividends, from 8 to 11 per cent, and on April 7, 1835, an act was passed extending defendant's charter from the first Wednesday of May, 1837 (the date of expiration of its former charter), and providing that the bank "shall, after the first Wednesday in May in the year 1837, and thenceforth," pay taxes as provided in the Act of April 1, 1835. Held, that since the act extending defendant's charter did not declare in negative terms that defendant should not be liable to the increased tax imposed by the general law until after its new

charter should take effect, it would not be regarded as repealing the general law as to defendant, and therefore it was subject to the increased tax from the date of the passage of the law, notwithstanding the act of April 7, 1875. *Commonwealth v. Easton Bank*, 10 Pa. 442.

Recovery of excess legally due on dividends.—The auditor general and state treasurer have jurisdiction, under the Act of 1811, etc., to settle an account and state a balance against a bank for unpaid taxes on dividends; and the fact that an amount was paid and received by the treasurer for such taxes does not preclude a settlement of an account for the excess legally due. *Commonwealth v. Easton Bank*, 10 Pa. 442.

46. To depositors in savings bank.—*Cary v. Savings Union* (U. S.), 22 Wall. 38, 22 L. Ed. 779.

47. Taxability of surplus and undivided profits.—*State v. Bank*, 95 Tenn. 221, 31 S. W. 993. And see *Pollard v. First Nat. Bank*, 47 Kan. 406, 28 Pac. 202.

By the laws of New Jersey of 1862, p. 349, § 8, it is provided "that all private corporations are to be assessed at the full amount of their capital stock paid in and accumulated surplus." *State v. Utter*, 34 N. J. L. 489.

Act 1887, § 7, subsec. 10, after describing the various kinds of property to be taxed, provided that all other personal property, whether belonging to individuals, corporations, or firms, should be liable to taxation. Acts Ex. Sess. 1891, p. 76, c. 26, § 3, provides that the surplus and undivided profits in a bank shall be assessable to said bank, and the same shall not be considered in the assessment of the stock therein. Held, that these acts authorize the assessment of surplus and undivided profits of a bank. *State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

In the case of *Iowa State Sav. Bank v. Burlington*, 98 Iowa 737, 61 N. W. 851, the supreme court of Iowa held the

provided the state has imposed a tax upon it,⁴⁸ and it has been legally assessed.⁴⁹ The surplus and undivided profits of a bank are not exempt from taxation, under a charter exempting the capital stock from taxation.⁵⁰ Where, however, the surplus of a bank, under its charter and the laws of the state where it exists, is held to belong to the depositors,⁵¹ or is a guar-

surplus of a savings bank taxable under an act which provides that "the paid up capital of all savings banks shall be subject to taxation."

The "accumulated profits" of a bank, which have never been divided among the stockholders, but have been retained for banking purposes, are not a part of the capital stock in such sense as to be exempt from the general rules of taxation applicable to other property. *State Bank v. Milwaukee*, 18 Wis. 281.

The surplus of a foreign savings bank, invested in the capital stock of domestic banks, state and national, is taxable in this state, under the New York Laws 1882, c. 409, § 312, which provides that the stockholders in every bank, state or national, shall be assessed or taxed on the value of their shares of stock at the place where the bank is located, and that such shares of stock shall be assessed like other taxable property owned by individuals, and with like deductions. *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022, affirming 63 Hun 633, 18 N. Y. S. 675.

For a state to tax the surplus capital of national banks, in excess of the amount they are required to carry to their surplus fund semiannually, is not prohibited by congress, and is not an encroachment upon the constitutional powers vested in the federal government. *First Nat. Bank v. Petersburg*, 56 N. H. 38, 32 Am. Rep. 416.

The undivided profits of a national bank, beyond the amount required by law to be kept as a surplus fund, are taxable, though invested in government bonds. *First Nat. Bank v. Concord*, 59 N. H. 75.

A savings bank is not entitled to abatement of taxes because its surplus is not as large relatively as other such banks. *Petition of Union Five Cents Sav. Bank*, 68 N. H. 384, 36 Atl. 17.

Tax on surplus a property tax.—Rev. Laws 1905, § 839, provides for taxation of savings banks by deducting the total deposits and accounts payable from the assets, including personal property appertaining to the business, and for the listing of the surplus, if any, and its assessment as credits, as provided by § 835. Held, that the tax upon the surplus is a property tax, and

not a tax upon the franchise to exist as a corporation. *State v. Farmers', etc., Sav. Bank*, 114 Minn. 95, 130 N. W. 445, rehearing denied and judgment modified 130 N. W. 851.

The taxation of the surplus capital of national banks by state authority is not the taxation of the means or agencies employed by the general government for the execution of its constitutional powers, but is the taxation of the property of such agents. *First Nat. Bank v. Petersburg*, 56 N. H. 38, 32 Am. Rep. 416.

48. *State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

The original act incorporating a bank directed that counties should pay to the state semiannually a certain per cent on the stock actually paid in during the continuance of the charter. Before the bank was organized, such section was repealed by a supplement directing that in lieu of other taxes the bank should pay a tax semiannually, at a certain rate on the whole of the capital stock actually paid in during the continuance of the charter. By another act a certain tax was imposed on 75 per cent of the surplus or continuous fund of the banks of the state generally. Held, that the words "in lieu of other taxes" contained in the supplement to the charter did not exempt the bank from the payment of the last-mentioned tax imposed on its surplus by the general act. *State v. Bank (Del.)*, 2 Houst. 99, 73 Am. Dec. 699.

49. *State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

A bank can not escape taxation by investing its surplus in untaxable securities. Such securities must be counted in fixing the bank's assets, as they are designed and used to offset an equal amount of indebtedness. *State v. Assessor*, 37 La. Ann. 850.

50. Surplus and undivided profits taxable though capital stock exempt.—*State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

51. Where surplus held to belong to depositors.—*Groton Sav. Bank v. Barker*, 154 N. Y. 122, 47 N. E. 1103.

When the surplus of a savings bank, under its charter and under the laws of the state where it exists, belongs to its depositors and though it is

anty fund, which the bank is by statute required to keep, and which can not be used for dividends, it is exempt from taxation.⁵² Only that portion of the surplus capital of a bank is subject to taxation which is not invested in tax-paying property or property exempt from taxation.⁵³ Until a dividend is declared out of the bank's surplus, the shareholders have no title to it. The right and title is in the corporation.⁵⁴

not payable at the same time with their deposits, and may be retained for a time to meet contingencies, the depositors or their representatives are ultimately 'entitled to the pecuniary benefit of it, such surplus is a debt due the depositors, and under Laws 1857, c. 456, is not subject to taxation. Order 19 App. Div. 64, 45 N. Y. S. 811; Groton Sav. Bank v. Barker, 154 N. Y. 122, 47 N. E. 1103.

The exemption from taxation in the New York Laws 1896, c. 908, § 4, subd. 14, of "the deposits in any bank for savings which are due depositors," includes the surplus fund accumulated under Banking Law 1892, c. 689, § 123, which is accumulated for the security of such depositors, and "to meet any contingency or loss in the business from the depreciation of its securities or otherwise." *Newburgh Sav. Bank v. Peck*, 22 Misc. Rep. 477, 50 N. Y. S. 820, judgment affirmed 32 App. Div. 624, 52 N. Y. S. 259, and 157 N. Y. 51, 51 N. E. 412.

The surplus fund of a savings bank, which Laws 1892, c. 689, § 123, authorizes to be accumulated for the depositors' security, is exempt from taxation, under Laws 1896, c. 908, § 4, subd. 14, exempting "the deposits in any bank for savings which are due depositors," as said § 123 provides for a division among depositors of excess accumulations above 15 per cent of the deposits, thereby declaring that the surplus belongs to depositors. Order 52 N. Y. S. 259, affirmed. *Newburgh Sav. Bank v. Peck*, 157 N. Y. 51, 51 N. E. 412.

A savings bank in New York is not liable to be taxed on uninvested cash, not a surplus after deducting debts. *People v. Beers* (N. Y.), 67 How. Prac. 219.

Under Tax Act 1851, authorizing the taxation of the stock of a corporation in the hands of stockholders, and exempting from taxation so much of the property of the corporation as is represented by the stock taxed in the hands of stockholders, the surplus fund of a bank is exempt from taxation, as it belongs to the stockholders,

and is represented by the stock. *Belvidere Bank v. Tunis*, 23 N. J. L. 546.

The reserved profits of a savings bank, whose charter empowers the directors by a majority vote to "divide the whole property among the depositors in proportion to their respective interests therein," belong to the depositors, and can not be taxed as the property of the bank. *Mechanics' Sav. Bank v. Granger*, 17 R. I. 77, 20 Atl. 202.

52. Guaranty fund required by statute to be kept by savings banks.—The public statute of New Hampshire, c. 65, §§ 5, 11, 12, requires every savings bank to pay to the state treasurer annually, on October 1st, a tax of 1 per cent on the amount of the deposits on which it pays interest, and its capital stock, less the value of all its real estate; and provide that the real estate shall be taxed to the corporation in the town where situated, and that "the taxes assessed as aforesaid upon savings banks * * * shall be in lieu of all other taxes against the corporation and against their stockholders and depositors on account of their interests therein." Chapter 165, § 16, requires such banks to keep a guaranty fund, which can not be used for dividends. Held, that the guaranty fund can not be taxed in the town where the bank is located under the designation of "surplus capital." *Laconia Sav. Bank v. Laconia*, 67 N. H. 324, 38 Atl. 384.

53. Limitation of taxability.—*Mechanics' Nat. Bank v. Concord*, 68 N. H. 607, 44 Atl. 704.

54. Shareholders without title until dividend declared from surplus.—*State v. Bank*, 95 Tenn. 221, 31 S. W. 993.

A dividend, declared by a bank and paid by issuing to its stockholders time checks payable at future dates, is, before the time for presentation of the checks, an asset for the bank, and subject to taxation. *Grenada Bank v. Adams*, 87 Miss. 669, 40 So. 4.

Declaration of dividend out of surplus as subterfuge to avoid taxation.—Whether a resolution of the direct-

§ 326 (1f) Deposits.—United States Tax.—The United States internal revenue law formerly laid a tax of one twenty-fourth of one per centum per month on the deposits with any person or corporation engaged in banking. But this was repealed by the Act of March 3, 1883, ch. 21, 22 Stat. L. 488.⁵⁵

State Tax.—With regard to the state's taxation of deposits in banks, the decisions vary in the various jurisdictions. Thus, according to some authorities, moneys deposited in a bank by its customers become the property of the bank and are taxable as such;⁵⁶ while according to others, bank

ors of a national bank, made February 28th, declaring a dividend of \$40,000, payable out of the surplus, to be placed to the credit of stockholders' account, and to remain as a deposit until otherwise ordered, is a mere subterfuge to avoid taxation on the 1st day of March following, or is made in good faith, is a question of fact to be determined by the trial court; and where that court has heard the testimony of witnesses, and made a finding in favor of the good faith of the transaction, and there is some evidence to support such finding, it will not be disturbed on appeal. *Pollard v. First Nat. Bank*, 47 Kan. 406, 28 Pac. 202.

55. Former United States tax on deposits.—See, construing this tax law, *Savings Bank v. Archbold*, 104 U. S. 708, 26 L. Ed. 901; *Bank v. Collector* (U. S.), 3 Wall. 495, 18 L. Ed. 207; *Oulton v. Savings Inst.* (U. S.), 17 Wall. 109, 21 L. Ed. 618.

State funds on deposit taxable by United States as deposits.—*Manhattan Co. v. Blake*, 148 U. S. 412, 37 L. Ed. 504, 13 S. Ct. 640.

Deposits in savings banks.—*Savings Bank v. Archbold*, 104 U. S. 708, 26 L. Ed. 901; *Bank v. Collector* (U. S.), 3 Wall. 495, 18 L. Ed. 207; *Oulton v. Savings Inst.* (U. S.), 17 Wall. 109, 21 L. Ed. 618.

Entry in depositor's passbook.—*Oulton v. Savings Inst.* (U. S.), 17 Wall. 109, 21 L. Ed. 618.

Regulation limiting right to withdraw.—*Oulton v. Savings Inst.* (U. S.), 17 Wall. 109, 21 L. Ed. 618.

56. Taxation of deposits as property of bank.—*Los Angeles v. State Loan, etc., Co.*, 109 Cal. 396, 42 Pac. 149; *Commonwealth v. Peoples', etc., Sav. Bank* (Mass.), 5 Allen 428; *Commonwealth v. Barnstable Sav. Bank*, 126 Mass. 526; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703; *Petition of Union Five Cents Sav. Bank*, 68 N. H. 384, 36 Atl. 17; *Wyatt v. State*

Board, 74 N. H. 552, 70 Atl. 387; *Bridgewater v. Amerman*, 37 N. J. L. 408; *Montpelier Sav. Bank, etc., Co. v. Montpelier*, 73 Vt. 364, 50 Atl. 1117; *State v. Clement Nat. Bank* (Vt.), 78 Atl. 944.

Moneys deposited with a bank or banker, unless specially deposited, become the moneys of the bank or banker, appertaining to the business of banking, and proper to be listed with the other money belonging to that business, and this is equally true of general deposits, whether they happen to be used in the discounting of paper, or held in reserve to pay probable current demands. *Ellis v. Linck*, 2 O. St. xiii.

Moneys deposited in a savings bank by its customers become its property, and are taxable as such. *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703.

Savings banks without capital stock, being taxable for the full amount of their property and valuable assets, without any deduction for debts or liabilities, are to be taxed for their deposits. *Bridgewater v. Amerman*, 37 N. J. L. 408.

The California Pol. Code, § 3617, provides that demands due on account of money deposited with savings and loan corporations shall, for taxation purpose, be treated as an interest in the property, and shall not be assessed to the owner thereof. Held, that a corporation authorized by its charter to do a general loan and trust business, but which also conducted a "savings department," and paid a stipulated rate of interest on deposits in that department, though the depositor did not otherwise participate in the corporation's earnings, was subject to taxation on the amount deposited in said department. *Los Angeles v. State Loan, etc., Co.*, 109 Cal. 396, 42 Pac. 149.

Whether or not a corporation was engaged in the transaction of a sav-

ings and loan business is not, for the purpose of taxation conclusively determined by its articles of incorporation. *Los Angeles v. State Loan, etc., Co.*, 109 Cal. 396, 42 Pac. 149.

Under the New Hampshire Laws 1864, c. 4028, as amended by Laws 1872, c. 17, § 2, Laws 1869, c. 4, § 1, and Laws 1895, c. 108, § 1, requiring the treasurers of savings banks to return a statement of the deposits and accumulations due from the bank to each depositor, and pay to the state treasurer three-fourths of 1 per cent on general deposits, and 1 per cent on special deposits and accumulations, after deducting the value of the bank's real estate, a bank is taxable for the amount of its deposits if the value of its assets is equal to such amount, though it receives no income from some of the assets. *Petition of Union Five Cents Sav. Bank*, 68 N. H. 384, 36 Atl. 17.

The tax of 1 per cent on deposits in savings banks, imposed by the New Hampshire Pub. St. 1901, c. 65, § 5, re-enacting a previous statute, passed to secure the taxation of such accumulations which had largely escaped taxation, construed by the courts to impose a tax on property, is a tax on property. *Wyatt v. State Board*, 74 N. H. 552, 70 Atl. 387.

The legislature have power to impose upon savings banks an annual tax on account of their deposits, founded upon the amount of their deposits, to be assessed one half on the average amount of deposits, for the six months preceding the 1st day of May, and the other half on the average amount for the six months preceding the 1st day of November; and if a statute imposing such taxes is passed in April, a tax may be levied under it founded upon the average amount of deposits for the six months preceding the 1st day of May of the same year. *Commonwealth v. People's, etc., Sav. Bank (Mass.)*, 5 Allen, 428.

A savings bank is liable to the tax imposed by St. 1862, c. 224, and St. 1868, c. 315, one half on the average amount of deposits for the six months preceding the 1st day of May, and the other half on the average amount for the first six months preceding the 1st day of November, although it is on one of those days, and has been, for more than six months preceding, temporarily prohibited by writ of injunction, issued on the petition of the commissioners, from proceeding with its business, except in receiving and col-

lecting money due to it, in making investments in specified securities, and in foreclosing mortgages and selling land held by foreclosure; and although it is after May 1st perpetually restrained from doing business, and receivers are appointed. *Commonwealth v. Barnstables, Sav. Bank*, 126 Mass. 526.

V. S. §§ 582, 583, requires savings banks and trust companies to pay a certain state tax on their deposits, including money or securities received as trustees. Section 584 provides that no other tax shall be assessed on such deposits or accumulations in savings banks or in trust companies, except individual deposits exceeding in the aggregate \$1,500. Held, that the word "deposit," as so used, was not limited to deposits in the ordinary sense, but also includes securities held as a part of a trust fund by such bank or trust company. *Montpelier Sav. Bank, etc., Co. v. Montpelier*, 73 Vt. 364, 50 Atl. 1117.

V. S., §§ 582-584, requiring every savings bank and trust company to pay a state tax upon the average amount of its deposits, after deducting therefrom individual deposits in excess of \$1,500 each, and providing that no other tax shall be assessed on such deposits, except on individual deposits exceeding \$1,500, do not prevent the assessment of municipal taxes on the excess over \$1,500 of a trust fund held by a bank or trust company as trustee. *Montpelier Sav. Bank, etc., Co. v. Montpelier*, 73 Vt. 364, 50 Atl. 1117.

The special charter of a savings bank (Laws 1898, No. 220) authorized it to receive money on deposit or in trust at such interest, not exceeding the legal rate, and on such terms, as might be agreed upon. It was also authorized to issue letters of credit, purchase and sell stocks, bonds, etc., and to discount bills of exchange, etc. Held that, in view of the historical development of savings banks, showing them to be successors to state banks of circulation, discount, and deposit, and as the bank in question had all the powers given banks of circulation, discount, and deposit by V. S. c. 173, except the power to buy and sell gold and silver bullion, foreign coin, and bills of exchange, such bank was a bank of discount and deposit, authorized to receive noninterest-bearing commercial deposits as well as those for savings and investment, the word "deposits" in the charter covering both classes of deposits; and

deposits are held to be taxable to the depositors and not to the bank.⁵⁷ A

hence, under V. S. 583, 584, as amended by Laws 1896, No. 18, § 2, imposing a tax on savings banks in proportion to their average deposits, such bank was taxable on its total deposits, without distinction as to whether they were commercial or savings. *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246, 52 Atl. 1069.

The deposits of savings banks in Maryland, invested in ground rents, reserved under leases of 99 years, renewable forever, on property which by the law of the state is assessed to, and the taxes thereon paid by, the leasehold owners, are not liable to taxation under chapter 483, Laws 1874, which provides that the officers of a savings bank shall furnish to the comptroller, on or before the first day of July in each year, the aggregate amount of deposits in such corporation, and shall pay to the treasurer, on or before the first day of January succeeding, out of the interest due the depositors, the state tax on said deposits. *State v. Central Sav. Bank*, 67 Md. 290, 10 Atl. 290, 11 Atl. 357.

Where bank in hands of receivers.—The provisions of St. 1862, c. 224, regulating taxation of savings banks, do not apply to corporations in the hands of receivers, and perpetually enjoined from transacting business, even though they have transacted business during a part of the six months next preceding the assessment day; namely, May 1st, or November 1st. *Commonwealth v. Lancaster Sav. Bank*, 123 Mass. 493.

Where a receiver deposits in a bank money acquired by the sale of personalty in his hands, the corporation of which he is receiver remains the legal owner of the fund, and hence the receiver is not liable to be taxed as the owner of the debt created by the deposit. *City Nat. Bank v. Baker Co.*, 180 Mass. 40, 61 N. E. 223.

Although a savings bank has invested a portion of its funds in United States securities, the tax imposed by St. 1862, c. 224, and St. 1863, c. 164, may be assessed upon the whole average amount of its deposits, as therein provided, and may be collected in full. *Commonwealth v. Provident Inst. (Mass.)*, 12 Allen 312, affirmed *Provident Inst. v. Massachusetts (U. S.)*, 6 Wall. 611, 18 L. Ed. 907.

A savings bank, the property and business of which are in the possession of a bank commissioner, under St.

1910, c. 399, held not liable to the tax imposed by Mass. St. 1909, c. 490, pt. 3, § 21, on deposits. *Greenfield Sav. Bank v. Commonwealth (Mass.)*, 97 N. E. 927.

57. Deposits taxable not to bank, but to depositors.—*Branch v. Marengo*, 43 Iowa 600; *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730; *Campbell v. Riviere (Tex. Civ. App.)*, 22 S. W. 993; *Commonwealth v. Bank*, 118 Ky. 547, 26 Ky. L. Rep. 407, 81 S. W. 679; *Deposit Bank v. Daviess County*, 102 Ky. 174, 39 S. W. 1030, 44 L. R. A. 825; *Commonwealth v. Wathen*, 31 Ky. L. Rep. 980, 104 S. W. 364.

A banker is liable to taxation only for such moneys and credits as are in his possession as owner, and not for those which he may hold as the custodian of others. Bank deposits are taxable to the depositors, and not to the bank. *Branch v. Marengo*, 43 Iowa 600.

Money deposited in a bank by a receiver is money on hand, and not a debt against the bank, and is liable to taxation. *Campbell v. Riviere (Tex. Civ. App.)*, 22 S. W. 993.

Although a deposit in a bank subject to the sight check of the depositor is usually held to be only a debt against the bank, it is regarded by the laws of Texas providing for the rendition of property for taxation as cash, and as such is not subject to be set off for the purposes of taxation by the liabilities of the depositor. *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730.

A depositor of money in bank subject to his sight check can not escape its taxation as cash by showing that the bank did not, at the time it was assessed, actually have so much money in its vaults. *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730.

While a bank may credit a customer's deposit on his overdue paper held by the bank, the money belongs to the customer, and is subject to his checks until the bank exercises this right; and, until this is actually done, the money is taxable in the depositor's hands as if he owed nothing to the bank. *Commonwealth v. Wathen*, 31 Ky. L. Rep. 980, 104 S. W. 364.

The Kentucky Const., § 171, provides that taxes shall be uniform, and shall be levied and collected by the general laws. Section 172 enacts that all property not exempted by the consti-

state tax upon a state bank, on account of its depositors, of a percentage on the amount of its deposits, has been held to be a franchise tax, not a tax on property, and valid.⁵⁸ Accordingly, a savings institution having a portion of its deposits invested in federal securities declared by the act of congress authorizing their issue to be exempt from taxation under state authority, is liable under such a statute to a tax on account of such deposits as on account of others.⁵⁹ A statute providing for the assessment of interest-bearing national bank deposits to the depositor at their face value, is not invalid for failure to provide for official valuation;⁶⁰ nor can the owner of

tution shall be assessed at its fair cash value. Section 174 requires that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted, and declares that all corporate property shall pay the same rate of taxation paid by individuals. Held, that banks are not required to pay taxes on the money deposited with them by their customers, or assets which represent it, but that the depositors are required to pay the tax on such money. *Commonwealth v. Bank*, 118 Ky. 547, 26 Ky. L. Rep. 407, 81 S. W. 679.

A deposit in a savings bank is taxable to the depositor, although deposited by him to the use of a third person, to whom it is payable on coming of age; but in case of the death of such person prior to that event, then to be paid "to me or my heirs on demand." *In re Perry*, 16 N. H. 44.

The provision of the New York Laws 1896, c. 908, § 4, subd. 14, exempting from taxation the deposits in any savings bank which are due to depositors, does not exempt the depositor, but only the bank. *In re Haight*, 32 App. Div. 496, 53 N. Y. S. 226.

Revenue Act 1903, § 4 (Comp. St. 1903, p. 1283), providing that the word "money," as used in the act for the purpose of listing for taxation shall include money deposited in bank or elsewhere, is intended to include money on general deposit in a bank. *Critchfield v. Nance County*, 77 Neb. 807, 110 N. W. 538.

Money which one has in the bank is not exempt from taxation because it was derived from his salary as a federal officer; it losing its identity as salary when it has been paid to him and come into his possession. *Dyer v. Melrose*, 197 Mass. 99, 83 N. E. 6.

Where a person, to escape taxation

on a deposit in a bank, makes a check for the amount of the deposit payable to himself in legal tender notes, which he receives and afterwards again places in the bank as a special deposit, and three days afterwards changes his special deposit of legal tender notes into a general deposit of current funds, the transaction as to the government is void, and the money deposited is not exempt from taxation. *Mitchell v. Leavenworth*, 9 Kan. 344.

Taxation to both bank and depositor.—According to some decisions it is apparently held that where money is deposited in a bank, the depositor may be taxed on the credit evidenced by the certificate of deposit, and the bank may be taxed on the money, which, by the deposit, passed absolutely to the dominion of the bank, and became its property, to use and control for its own purposes, and that this will not constitute double taxation. *Exchange Bank v. Hines*, 3 O. St. 1, 28. See, also, *Yuba v. Adams & Co.*, 7 Cal. 35; *Savings Bank v. New London*, 20 Conn. 111.

58. Tax of percentage on amount of deposits as franchise tax.—*Provident Inst., v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907; *Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *State v. Clement Nat. Bank* (Vt.), 78 Atl. 944.

59. Notwithstanding deposits invested in exempt securities.—*Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907. See, also, *Bank v. Collector* (U. S.), 3 Wall. 495, 18 L. Ed. 207; *Society v. Coite* (U. S.), 6 Wall. 594, 18 L. Ed. 897; *Hamilton Co. v. Massachusetts* (U. S.), 6 Wall. 632, 18 L. Ed. 904; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035, 23 S. Ct. 803.

60. Taxation of interest-bearing national bank deposits.—*State v. Clement Nat. Bank* (Vt.), 78 Atl. 944.

an interest-bearing national bank deposit object to an assessment of his credit representing the deposit at its full amount because of the possibility that the bank may prove insolvent.⁶¹

§ 326 (1g) Loans, Investments and Securities.—As a general rule banks may properly be taxed on the notes, mortgages, stocks, or other securities or evidences of indebtedness, held by them,⁶² and in some states

⁶¹ *State v. Clement Nat. Bank* (Vt.), 78 Atl. 944.

⁶² **Taxation of notes, mortgages, and other securities.**—*Farmers' Loan, etc., Co. v. Newton*, 97 Iowa 502, 66 N. W. 784; *Pennsylvania Co. v. Loughlin*, 139 Pa. 612, 21 Atl. 163; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. 359; *Bank v. State* (Miss.), 12 Smedes & M. 456.

Under the Pennsylvania Act of 1846, investments in mortgages and loans made by a corporation created to receive deposits, on which interest is allowed to the depositors, are taxable for state and county purposes. *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. 359.

A loan by a bank incorporated in another state to a bank incorporated in Mississippi is within the statute of Mississippi of 1841, subjecting loans at interest by individuals to a tax of one-fourth of 1 per cent. *Bank v. State* (Miss.), 12 Smedes & M. 456.

Under Act February, 1841, which levies a tax of one-fourth of 1 per cent on all money loaned at interest, a loan by the bank of the United States of Pennsylvania will be subject to tax, though the loan was made prior to the passage of the act. *Bank v. State* (Miss.), 12 Smedes & M. 456.

The Pennsylvania Act of June 1, 1889, § 1 (P. L. 420) imposes a tax upon all mortgages held by "any joint-stock company, association, limited partnership, bank, or corporation." Section 21 imposes a tax on the capital stock of corporations, but provides that corporations, etc., "liable to tax on capital stock under this section, shall not be required to pay further taxes on the mortgages," etc., "constituting any portion of their assets, within the appraisal value of their capital stock." Held, that the capital stock of corporations was first to be taxed at its appraised value, and then their mortgages not included in the appraised value of the capital stock are to be taxed under § 1. *Pennsylvania Co. v. Loughlin*, 139 Pa. 612, 21 Atl. 163.

The Pennsylvania Acts of June 7, 1879, of June 10, 1881, and of June 30, 1885, provide that "all mortgages and money owing by solvent debtors, * * * owned or possessed by any person or persons whatsoever," shall be liable to taxation for state purposes. Held, that the acts did not impose a tax on mortgages and other moneys at interest in the hands of corporations, in addition to the tax paid by the corporations upon their capital stock, and invested in such mortgages and loans, "persons" in the act not including corporations. *Hunter's Appeal* (Pa.), 10 Atl. 429; *Appeals of Loughlin* (Pa.), 10 Atl. 832.

A private banker is not within the proviso to Revenue Act June 8, 1891 (P. L. 229), § 1, imposing a tax of 4 mills on mortgages and moneys owing by solvent debtors, "whether by promissory note, or penal or single bill, bond or judgment," provided "that this section shall not apply to bank notes or notes discounted * * * by any bank, banking institution, savings institution or trust company," though Act June 27, 1895 (P. L. 396), § 1, imposes on private bankers a tax of 3 per cent on earnings. *Commonwealth v. McKean*, 200 Pa. 383, 49 Atl. 982.

Under Code Pub. Gen. Laws, art. 81, § 4, et seq., relative to state taxation of property held by banks and other corporations, except savings banks, providing that the tax shall be imposed on the holders of the capital, the value of the capital stock being taken as the value of the corporate property, and that the corporation shall collect the tax from the stockholders and pay it directly to the state, and § 86, Code Pub. Gen. Laws, and § 86a (Laws 1890, p. 537, c. 491), imposing on savings banks a tax of one-fourth of 1 per cent on their deposits, without any deduction for deposits invested in property which is not taxable or on which some other persons or corporations are required to pay taxes, and providing that such other persons or corporations shall not be entitled to exemption by reason

such taxation has been expressly required by the constitution.⁶³ In some

of the ownership of the property by a savings bank, a bank, savings bank, or other corporation is not exempt from taxation on any stock loans of the city of Baltimore of which it is the holder, within § 90, providing that the stock loans of said city, on which it shall pay the state tax for the holders thereof, shall not include that on which the holders thereof are exempt from taxation. *State v. Baltimore (Md.)*, 65 Atl. 369.

Where a corporation whose bonds are held by a state savings bank, fails to comply with Act June 30, 1885 (P. L. 193), requiring the treasurer of a corporation issuing bonds to deduct from the interest payable thereon, the four mills tax imposed on all corporate loans by Act June 8, 1891 (P. L. 229), and the savings bank fails to pay its capital stock tax within the time required by Act July 15, 1897 (P. L. 292), exempting a state savings institution from taxation on its bonds owned by it in its own right upon payment before March 1st in each year, of the tax imposed in such year upon the shares of its capital stock, the corporation is itself liable for the four mills tax on the bonds though the bank paid its capital stock tax a few days after the time required by the statute, and the corporation did not know of the bank's failure to secure the exemption. *Commonwealth v. Clairton Steel Co.*, 229 Pa. 246, 78 Atl. 131.

Bonds deposited with the auditor to secure the redemption of the bills issued by the banks are subject to taxation. *Bank v. Hamilton*, 21 Ill. 53.

Moneys, credits, and evidences of indebtedness, employed and invested within the state by a foreign banking corporation doing business therein, were not exempt from taxation, under subdivision 13, § 4, of the tax law (Laws 1896, p. 799, c. 908), exempting moneys of a nonresident under the control or in the possession of his agent in the state, when transmitted to such agent for investment or otherwise, because they were not in the hands of an agent, but in the corporation's own hands, and further because they were not sent to the corporation for collection, but belonged to it, and were needed and used in its business. *Order 52 Misc. Rep. 194*, 102 N. Y. S. 84, affirmed. *International Banking Corp. v. Raymond*, 117 App. Div. 62, 102 N. Y. S. 85.

Where a nonresident corporation is carrying on in the state a complete banking business, it can not claim exemption from taxation on its capital invested in the state, under Tax Law, Laws 1896, p. 799, c. 908, § 4, subd. 13, exempting money of a nonresident, under the control or in the possession of his agent in the state, when transmitted to such agent for the purpose of investment or otherwise; the provision applying only when the foreign principal retains control of his funds, and the transactions of the agent are confined to the mere loaning of the money, carrying on no trade or commercial or other dealing. *International Banking Corp. v. Raymond*, 52 Misc. Rep. 194, 102 N. Y. S. 84, order affirmed in 117 App. Div. 62, 102 N. Y. S. 85.

63. It is a requisition of the Ohio constitution, that "the general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property effects or dues of every description (without deduction), of all banks now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." Art. XII, § 3. The legislature endeavored to comply with this requisition, by an Act passed 12th April, 1858, 55 O. L. 128. Determining that it was not the intention of the constitution to regard as property subject to be taxed, every note or bill discounted, every sum of money loaned, all effects or dues of every description had or owned by any bank or banker during the fiscal year, the legislature provided: "To ascertain the amount of notes and bills discounted and purchased, and all other moneys, effects or dues of every description belonging to such bank or banking company, loaned, invested, or otherwise used or employed, with a view to profit, or upon which such bank or banking company receives, or is entitled to receive interest, * * * there shall be taken as a criterion, the average amount of the aforesaid items for each month during the year next previous to the time of making such statement, if so long such bank or banking company shall have been engaged in business, and if not, then during such time as such bank or banking company shall have been engaged

jurisdictions savings banks are expressly exempted from taxation on certain of their investments;⁶⁴ as, for instance, bank stock in which such savings banks have invested money received on deposit,⁶⁵ certain investments in real estate,⁶⁶ loans secured by mortgage on real estate, etc.⁶⁷ The fact

in business; and the average shall be made by adding together the amount so found belonging to such bank or banking company in each month, so engaged in business, and dividing the same by the number of months so added together." Section 2. The first two sections of the Act of 12th April, 1858, are in terms only applicable to incorporated banks of circulation; the third section extends to bankers and brokers, and applies the same rule of average value, provided in the second section, which, by a clerical error, was written or printed the twelfth. *Robinson v. Ward*, 13 O. St. 293.

Under the act of April 13, 1858 (55 Ohio Laws, p. 128), a partnership engaged in the business of banking was liable as such to the tax imposed by that act. *Robinson v. Ward*, 13 O. St. 293.

64. Exemption of savings banks from taxation on investments.—A savings bank is not subject to tax on its investments under the statutes. Depositors of more than \$250 are taxed on their deposits. *Rutland Sav. Bank v. Rutland*, 52 Vt. 463.

Under Pennsylvania Act July 15, 1897 (P. L. 292), a savings bank which pays a tax on its capital stock is exempt from taxation on bonds of a corporation owned by it. *Peoples' Sav. Bank v. Monongahela River, etc., Coke Co.*, 29 Pa. Super. Ct. 153.

65. Savings banks not taxable for bank stock in which deposits invested.—*Worcester County Inst. v. Worcester (Mass.)*, 10 Cush. 128.

By the Rhode Island Tax Act of January, 1855, bank stocks in which a savings institution has invested its deposits for income can not be taxed to the corporation; such stocks representing the deposits which, under the act, are taxable to the depositors in the towns where they respectively reside. *Providence Inst. v. Gardiner*, 4 R. I. 484.

Where a savings bank has complied with Laws 1895, c. 108, § 1, providing that a savings bank shall pay to the state treasurer annually a tax of three-fourths of 1 per cent on the amount of the general deposits on which it pays interest, after deducting the value of all its real estate and of its loans

secured by mortgage on real estate situated in the state, made at a rate not exceeding 5 per cent per annum, it is relieved from a further tax on bank stock which was purchased with a portion of the deposits. *Somersworth Sav. Bank v. Somersworth*, 68 N. H. 402, 44 Atl. 534.

66. Investments in real estate.—Under St. 1869, c. 4, taxing all deposits and accumulations in the civil savings banks in the state, however they may be invested, requiring such tax to be against the banks, and to be paid to the state in the first instance, and exempting the banks from any other taxation, real estate owned by a savings bank, purchased with the deposits and accumulations, is not subject to taxation as real estate in the place where located. *Rockingham, etc., Sav. Bank v. Portsmouth*, 52 N. H. 17.

By Pub. St., c. 116, § 20, cl. 7 (St. 1876, c. 203, § 9, cl. 6; St., 1870, c. 226), 10 per cent of the deposits of a savings bank, but not exceeding \$200,000, may be invested in the purchase of a suitable site, and the erection of a suitable building, for the convenient transaction of its business. By Pub. St. c. 13, § 20, savings banks are to pay a state tax, on account of their depositors, assessed on their deposits: "provided, that so much of the deposits as are invested in real estate used for banking purposes * * * shall be exempt from taxation under the provisions of this section, and that so much of said deposits as are invested in real estate, the title to which has been acquired by * * * purchase under the provisions of § 20, c. 116, shall be exempt," etc. Held, that the parts of an authorized bank building not used for banking purposes are also exempt from the state tax. In re *Suffolk Sav. Bank*, 149 Mass. 1, 20 N. E. 331.

The word "deposits," as used in § 20, means all the funds which the bank holds for investment. In re *Suffolk Sav. Bank*, 149 Mass. 1, 20 N. E. 331.

67. Loans secured by mortgage on real estate.—N. H. Laws 1895, c. 108, § 1, provides for a tax upon the general deposits in savings banks, "after deducting the value of all loans secured by mortgage upon real estate," etc. The report of the bank commis-

that loans made by a bank are secured by property which is exempt from taxation does not render such loans untaxable.⁶⁸ Under a statute declaring that a real estate mortgage shall be deemed an interest in land for the purposes of taxation, and that bank shares shall only be assessed after deducting the value of real estate taxed to the bank, mortgages held by a bank must be taxed to the bank, and deducted from the value of the shares of its capital stock, though the mortgagors had agreed to pay the taxes.⁶⁹ A statute providing for the assessment of the average value of the moneys and credits which have been in the possession of a corporation making loans, has no application when loans were made in the name of the corporation by private persons, but the corporation never had in its possession or control any of the moneys.⁷⁰

§ 326 (1h) Ownership or Possession of Property.—It would seem that a bank may properly be taxed on property held by it in trust, in the same manner that other trustees are bound to pay,⁷¹ but not on stocks

sioners, in view of which the statute was passed, classified savings-banks investments, including "loans secured by real estate," and, in a separate category, "railroad bonds," and recommended the reduction of taxation on such institutions. Laws 1895, c. 105, § 12; Id. c. 114, § 1, cls. 1, 9—distinguish between loans secured by mortgage of real estate and bonds. Acts 1901, c. 82, expressly excludes investments in railroad bonds from the benefit of the exemption provided for by Laws 1895, c. 108, § 1. Pub. St., c. 2, §§ 1, 2, require that, in the construction of the statutes, words and phrases shall be construed according to the common and approved usage of the language. Held, that the exemption in Laws 1895, c. 108, § 1, did not include railroad bonds, though secured by mortgage on the real estate and other property of the roads. *State v. Amoskeag Sav. Bank*, 71 N. H. 535, 53 Atl. 739.

68. Taxation of loans secured by exempt property.—Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 63 Pac. 665.

69. Taxation of mortgage to bank notwithstanding agreement by mortgagors to pay taxes.—*Latham v. Board*, 91 Mich. 509, 52 N. W. 15, following *Detroit v. Board*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

Act April 1, 1833 (Charter Citizens' Bank of Louisiana), § 24, providing that all mortgages executed to such bank for stock or bonds may be foreclosed at any time, notwithstanding the bona fides of any subsequent purchaser of the mortgaged property, does not

prevent a sale of such property for taxes, nor affect the validity of the tax title. *Augusti v. Citizens' Bank*, 46 La. Ann. 529, 15 So. 74.

70. Statutes taxing corporations making loans inapplicable where loans made by private persons in name of corporation.—*Farmers' Loan, etc., Co. v. Newton*, 97 Iowa 502, 66 N. W. 784.

The organization of a corporation to make and sell loans after its articles of incorporation had been filed, and blank applications for loans, notes, and mortgages had been procured for it by the promoters, was abandoned; no stock having been issued, or other property than the blanks acquired. These were assigned in blank by the corporation, and divided among the promoters, who never became members of the corporation. Held, that the corporation was not subject to assessment, as the owner of notes and mortgages appearing in its name in the county recorder's office, through the blanks being used by the promoters in their own business. *Farmers' Loan, etc., Co. v. Newton*, 97 Iowa 502, 66 N. W. 784.

71. Banks taxable on property held in trust.—*In re Philadelphia Sav. Fund Soc.*, 4 Clark 155, 7 Pa. L. J. 186.

Article 113 of the Texas Penal Code, which requires the taxpayer to render his property for assessment, applies, not only to the property actually owned by him, but to all property held by him in a fiduciary capacity, and includes bank officials with respect to the shares, stocks, etc., owned by the individuals of the corporation. *Downes v. State*, 22 Tex. Cr. App. 393, 3 S. W. 242.

pledged to it as collateral security for a debt.⁷² Money, notes and credits in the hands of assignees or liquidators of insolvent state banks have been held to be subject to taxation.⁷³

§ 326 (1i) Taxation on Circulation—§ 326 (1ia) In General.—Express provision has been made by acts of congress for the taxation of the circulation of both state and national banks.⁷⁴

§ 326 (1ib) Purpose of Provisions Taxing Circulation.—The purpose of the semiannual tax of two per cent on the amount of the circulating notes of a national bank was not revenue, but to reimburse the treasury for expenses incurred in printing the notes and all other expenses. The purpose of the tax on the state banks was revenue, coupled with the policy of

72. Not taxable on property pledged as collateral security.—*Waltham Bank v. Waltham* (Mass.), 10 Metc. 334.

73. Money, etc., in hands of assignees or liquidators of insolvent banks.—The notes and solvent credits of an insolvent state bank passing to an assignee by a general assignment before February 1st in any year are taxable in the hands of the assignee, under Code 1892, § 3755, providing that each person, when required, shall make out and deliver to the assessor a true list of his taxable personal property, held in his own right or as trustee or otherwise, on February 1st preceding. *Gerard v. Duncan*, 84 Miss. 731, 36 So. 1034, 66 L. R. A. 461.

The assignees of the Bank of Illinois, being a quasi corporation, are bound to pay the taxes assessed on the property thereof. *Ryan v. Gallatin*, 14 Ill. 78.

Money in possession of the liquidators of an insolvent bank is subject to taxation. *State v. Bank*, 50 La. Ann. 696, 23 So. 464.

74. Statutory provisions for taxation of circulation.—On the 25th of February, 1863, the act authorizing national bank associations was passed, in which, for the first time during many years, congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the Act of March 3d, 1863, a similar but lighter tax of one per cent, annually was imposed on the circulation of state banks in certain proportions to their capital, and of two per cent on the excess; and the tax on the national associations was reduced to the same rates. Both acts also imposed taxes on capital and deposits, which need not be noticed here. At a later date, by the Act of June 3d,

1864, which was substituted for the Act of February 25th, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the states; and a few days afterwards, by the Act of June 30, 1864, to provide ways and means for the support of the government, the tax on the circulation of the state banks was also continued at the same annual rate of one per cent, as before, but payment was required in monthly installments of one-twelfth of one per cent, with monthly reports from each state bank of the amount in circulation. It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law. The first step taken by congress in that direction was by the Act of July 17, 1862, prohibiting the issue and circulation of notes under one dollar by any person or corporation. The act just referred to was the next, and it was followed some months later by the Act of March 3d, 1865, amendatory of the prior internal revenue acts, the sixth section of which provides, "that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of the notes of any state bank, or state banking association, paid out by them after the 1st day of July, 1866." The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association used for circulation, and paid out by them after the first

ultimately compelling the retirement of state bank notes.⁷⁵ The statutory provisions embodied in Rev. St. §§ 3410, 3411, 3417 (U. S. Comp. St. 1901, pp. 2248, 2251), which declare that whenever the outstanding circulation of any bank does not exceed five per cent of its capital "said circulation shall be free from taxation," does not extend to national banks. It was intended only as an inducement to state banks to be converted into national banks by exempting from taxation all their circulating medium below five per cent of their capital, issued and emitted under state organization.⁷⁶

§ 326 (1ic) Provisions Construed and Applied.—The word "issued," as used in the act placing a tax of one-twelfth of one per cent a month on the "average amount of circulation issued by any bank," etc. (Rev. Stats., § 3408), means not only the making of the notes, but includes also the idea of putting them out into circulation.⁷⁷

What Subject to Tax.—The tax of ten per cent which all banks and banking associations, state and national, are required to pay "on the amount of notes of any person, or of any state bank or state banking association, used for circulation and paid out by them" (Rev. Stats., § 3412), applies to amounts paid out by the state bank in its own previously issued notes, as well as to payments in notes of persons or other state banks.⁷⁸ Section 19 of the act of February 8, 1875, which provides "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them," must be construed as limited in its effect to notes payable in money; otherwise all sorts of negotiable paper, such as "grain receipts," fare tickets, and the like, might be subject to the same taxation.⁷⁹

day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." *Veazie Bank v. Fenno* (U. S.), 8 Wall. 533, 19 L. Ed. 482, 38 How. Prac. 147.

75. Purpose of taxation of circulation.—*Merchants' Nat. Bank v. United States*, 42 Ct. Cl. 6.

76. Merchants' Nat. Bank v. United States, 42 Ct. Cl. 6.

77. Meaning of "issued" as used in Rev. Stats., § 3408.—*Deposit Sav. Ass'n v. Mayer*, Fed. Cas. No. 3813.

78. What subject to tax.—*Deposit Sav. Ass'n v. Mayer*, Fed. Cas. No. 3813; *Deposit Sav. Ass'n v. Marks*, Fed. Cas. No. 3812, 3 Woods 553.

79. In re Aldrich, 16 Fed. 369; *United States v. Wilson*, 106 U. S. 620, 27 L. Ed. 310, 2 S. Ct. 85. See, also, *Hollister v. Zion's, etc., Inst.*, 111 U. S. 62, 28 L. Ed. 352, 4 S. Ct. 263.

The tax imposed by Act Cong. Feb. 8, 1875, § 19, upon "notes used for circulation," is a charge upon such notes

only as are intended to circulate as money. The act bears no reference to the so-called notes issued by mercantile firms to be redeemed in goods. *United States v. White*, 19 Fed. 723.

Section 5172, Rev. Stat., provides how the notes contemplated by the National Bank Act shall be printed, and what they shall contain. No provision is made for a note for less than one dollar. A note for a fractional sum is not only unknown to the law, but its issue is unlawful. Section 3583. The supreme court, by deciding that an obligation "payable in goods" was not illegal, has left the inference to follow almost necessarily that it was not such a note as was contemplated by the statute, and therefore not taxable. *In re Aldrich*, 16 Fed. 369.

The nineteenth section of the Act of February 8, 1875 (18 Stat. 311), providing that "every association other than national bank associations, and every corporation, * * * shall pay a tax of ten per centum on the amount

§ 326 (2) Of National Banks—§ 326 (2a) Federal Taxation.—National banks are subject to a duty of one-half of one per centum each half year (now one-fourth of one per centum when secured by two per centum bonds of the United States), upon the daily average amount of its notes in circulation. There was formerly a duty of one-quarter of one per centum each half year upon the average amount of its deposits; and a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds,⁸⁰ but the last two modes of taxation were omitted from § 5214 as amended by the Act of May 30, 1908.⁸¹

Abatement of Tax on Insolvent National Banks.—The Act of March 3, 1879 (Supp. Rev. St. p. 449, c. 125, § 22), providing that, if a national bank has become insolvent, no tax shall be assessed, collected, or paid to the United States which would diminish the assets necessary for the full payment of its depositors, and that such taxes shall be abated, was intended to relieve depositors from contributing to the payment of taxes assessed, not on them, but on the assets of the proprietors as a corporation, and abates the tax when the proprietors have no such assets which can be reached from which to pay such tax.⁸²

§ 326 (2b) State Taxation—§ 326 (2ba) In General.—As has been already seen, in the absence of congressional action, a state can not tax any property of a national bank, and its property can only be taxed to the extent that the general government has granted to the state permission to do so.⁸³ Section 5219 of the United States Rev. Stats. (U. S. Comp. St., 1901, p. 3502) limits the right of a state, in the matter of taxing national

of their own notes used for circulation and paid out by them," does not apply to certificates of indebtedness, bearing interest, and payable to bearer on a certain day therein named, issued in denominations of five and ten dollars each, and paid out by a railroad company to its employees for wages, and providing that they would be received by the company at or before maturity for any debts due the company. These notes or certificates, having been issued only to the employees of the company on account of wages, and when paid by the company having been canceled and not reissued, were not "used for circulation," and that they were used afterwards by those to whom they were issued to discharge their debts to others, or to purchase subsistence for themselves, does not affect the character imposed upon them by the company. Philadelphia, etc., R. Co. v. Pollock, 19 Fed. 401.

80. Provision of United States Rev. Stats., § 5214 as to taxation of national banking association.—First Nat. Bank

v. Province, 20 Mont. 374, 51 Pac. 821; Van Allen v. Assessors (U. S.), 3 Wall. 573, 18 L. Ed. 229.

81. See § 5214, Rev. Stat., as amended May 30, 1908, making this change and also making the tax much heavier where issue secured other wise than by federal bonds.

82. Abatement of taxation on insolvent national banks.—Johnston v. United States, 17 Ct. Cl. 157.

83. Limitation of power of state to tax national banks.—Daly Bank, etc., Co. v. Board, 33 Mont. 101, 81 Pac. 950. See ante, "Power of State," § 324 (1).

National banks organized under Act Cong. Feb. 25, 1863 (12 Stat. 665), are subject to state taxation within the limits indicated by Act Cong. June 3, 1864, § 41 (13 Stat. 111). That section is an authoritative interpretation by congress of the intent of the Act of 1863, and shows that that act did not exclude state taxation. Stetson v. Bangor, 56 Me. 274.

banks, to taxing to the bank its real estate, and to the stockholders the shares of capital stock owned by them.⁸⁴ This excludes from taxation by the state all personal property owned by a national bank.⁸⁵ Under the statute of the

84. States power of taxation limited to real estate and shares of stock.—*Daly Bank, etc., Co. v. Board*, 33 Mont. 101, 81 Pac. 950; *First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988; *National State Bank v. Young*, 25 Iowa 311.

Under The National Banking Act, approved June 3, 1864, no revenue can be collected by a state, county, or municipality from banks organized under the act, except by assessment upon their shares and real estate. *National State Bank v. Young*, 25 Iowa 311.

A state can not tax a bank chartered by congress, except upon its real property. *Stapylton v. Thaggard*, 33 C. C. A. 353, 91 Fed. 93.

Act No. 122, Laws of Michigan 1867 (p. 163), providing for the levy and collection of a specific tax upon national banks, is unconstitutional. *First Nat. Bank v. Watkins*, 21 Mich. 483.

Under the United States Revised Statutes the state is left free to exercise the power of taxation of national banks, assessing the same upon the real property of the bank, or upon the shares of its capital stock, at the election of the state, in accordance with the constitution and laws of the state, and only in conformity with the rules applicable to the citizens and corporations of the state. *Frederick County Com'rs v. Farmers', etc., Nat. Bank*, 48 Md. 117.

The capital stock of a national bank can not be assessed, as such, by state authority. The only way such stock can be reached is by assessment of the shares of the different stockholders. *Collins v. Chicago*, Fed. Cas. No. 3,011, 4 Biss. 472.

The act of congress under which the national banks were organized allows the taxation by the states of the shares of stock in the banks, but not of the capital stock itself. *Smith v. First Nat. Bank*, 17 Mich. 479.

85. Exclusion from taxation of personal property of national banks.—*Daly Bank, etc., Co. v. Board*, 33 Mont. 101, 81 Pac. 950; *First Nat. Bank v. Province*, 20 Mont. 374, 51 Pac. 821.

Where the general government has pointed out a method by which the real estate of a national bank within any state may be taxed, and also the method of taxing the stock in the same bank within the state where it is located, the state is excluded from all

other methods of taxation on the bank property. *State v. First Nat. Bank*, 4 Nev. 348.

The personal property of a national bank can not be directly assessed for taxation by state authorities. *San Francisco v. Crocker-Woolworth Nat. Bank*, 92 Fed. 273.

Rev. St. U. S., § 5219, providing that shares of stock in a national bank may be taxed in such manner as the legislature may direct, does not authorize a tax on the bank's personal property, notwithstanding the legislature has made no provision for the taxing of shares, and the tax levied does not exceed in amount what might have been assessed on the shares under legal authority therefor. *First Nat. Bank v. San Francisco*, 129 Cal. 96, 61 Pac. 778.

Rev. St. U. S., § 5219, providing that the shares of stock of a national bank may be taxed in the city where it is located, does not authorize the taxation by a city of the personal property of a bank located therein. *National Bank v. Long*, 6 Ariz. 311, 57 Pac. 639.

Property used in transaction of business.—Gen. St. 1888, § 3832, provides for the taxation of the property of every corporation whose stock is not taxable, and whose property is not exempt by law. Section 3833 provides that real estate owned by any corporation, not required in its business, shall be taxable as provided in the preceding section. Section 3836 provides that shares of capital stock of national banks shall be taxed to the shareholders, but so much of the capital as may be invested in real estate on which it pays a tax shall be deducted from the market value of its stock. Held, that property of a national bank used in the transaction of its business is not subject to direct taxation. *Middletown Nat. Bank v. Middletown*, 74 Conn. 449, 51 Atl. 138.

The personal property of an insolvent national bank in the hands of a receiver appointed under Rev. St., § 5234 [U. S. Comp. St. 1901, p. 3507], is exempt from taxation under state laws. *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832. See, also, *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705.

The furniture of national banks is exempt from state taxation, because congress has not permitted it. Cov-

United States no tax can be levied on national banks, based on income,⁸⁶ licenses,⁸⁷ or franchises.⁸⁸ A state may not lay a tax upon the moneyed capital of a national bank invested in government securities.⁸⁹ A state can not impose a tax on the presidents of national banks doing business in the state, since the president is an officer prescribed by the act of congress, through whom, in part, the business of the association must be carried on, and hence a tax on the president, as such, would be a burden on a federal agency.⁹⁰

ington City Nat. Bank *v.* Covington, 21 Fed. 484.

Mortgages held by national banks are not subject to taxation by a state. First Nat. Bank *v.* Kreig, 21 Nev. 404, 32 Pac. 641.

86. Income tax.—Schuster & Co. *v.* Louisville, 124 Ky. 189, 28 Ky. L. Rep. 588, 89 S. W. 689.

87. License tax.—Schuster & Co. *v.* Louisville, 124 Ky. 189, 28 Ky. L. Rep. 588, 89 S. W. 689.

88. Franchise or intangible property.—Third Nat. Bank *v.* Stone, 174 U. S. 432, 43 L. Ed. 1035, 19 S. Ct. 759; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537; Louisville *v.* Third Nat. Bank, 174 U. S. 435, 43 L. Ed. 1037, 19 S. Ct. 874; Louisville *v.* Citizens' Nat. Bank, 174 U. S. 438, 43 L. Ed. 1038, 19 S. Ct. 876; Graves County *v.* First Nat. Bank, 108 Ky. 194, 21 Ky. L. Rep. 1656, 56 S. W. 16; Schuster & Co. *v.* Louisville, 124 Ky. 189, 28 Ky. L. Rep. 588, 89 S. W. 689.

A national bank is only taxable on its real estate and shares of stock as property of its stockholders, nor can there be a taxation of the bank's franchise in lieu of taxation of its shares. State *v.* Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944.

St. Ky. 1894, c. 108, providing for a tax on the "franchise" of corporations, associations, etc. (§ 4077), taking the whole act together, and especially §§ 4078-4081, is to be construed, not as a tax on the franchise in the technical sense, but upon all the intangible property of the corporation; and this tax not being levied upon the shares of stock in the names of the shareholders, nor equivalent in law to a tax so levied, the provision is void as applied to national banking associations, as not being authorized by Rev. St. U. S., § 5219, which permits the states to tax the shares in such an association in the names of the holders thereof. Decree, 19 Ky. L. Rep. 247, 39 S. W. 1116, reversed. Owensboro Nat. Bank *v.* Ow-

ensboro, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

The Revenue Law of 1892 having been declared unconstitutional in so far as it provided for the taxation of the franchises of national banks, no mode was provided for the taxation of such banks prior to the Act of March 21, 1900; and therefore it was not error to refuse, prior to the time that law took effect, to require the assessment of the capital stock, surplus, and undivided profits of a national bank for county purposes for the year 1896. Owen County Court *v.* Farmers' Nat. Bank, 22 Ky. L. Rep. 916, 59 S. W. 7.

P. S. 744, 745, imposing a tax of 7-10 of 1 per cent on the average deposits of savings banks and trust companies, is a franchise tax inapplicable to national banks. State *v.* Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944.

The Kentucky Revenue Act of November 11, 1892, providing for the taxation of banks and other corporations, as applied to national banks, is a tax, not on the franchise granted by congress, but on the equivalent in value of it shares of capital stock, and is not therefore in violation of Rev. St., § 5219, prescribing that the manner in which national banks may be taxed by the states. First Nat. Bank *v.* Stone, 88 Fed. 409.

89. Capital invested in government securities.—First Nat. Bank *v.* Kentucky (U. S.), 9 Wall. 353, 19 L. Ed. 761; Old Nat. Bank *v.* Berkeley County Court, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. 584; Sumter *v.* National Bank, 62 Ala. 464, 34 Am. Rep. 30; Salt Lake City Nat. Bank *v.* Golding, 2 Utah 1.

The 10 per cent bank tax on municipal notes paid out is not on the notes, but on their use as a circulating medium; and Rev. St., § 3413, prescribing such tax, is not invalid as a tax on an instrumentality of the state. Merchants' Nat. Bank *v.* United States, 101 U. S. 1, 25 L. Ed. 979.

90. State tax on president of national bank.—Linton *v.* Childs, 105 Ga. 567, 32 S. E. 617.

An act imposing a tax on the presi-

§ 326 (2bb) Real Property.—It is expressly provided by § 5219, U. S. Rev. Stats., that “nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent according to its value, as other real property is taxed.”⁹¹

dents “of each of the banks of the state” includes the presidents of national banks. *Linton v. Childs*, 105 Ga. 567, 32 S. E. 617.

In Massachusetts, a law taxing savings banks a percentage on the average amount of their deposits is valid, the tax not being on property, but on the corporate franchise; and therefore a bank is liable for such tax, though a portion of its deposits is invested in United States securities which are exempt from taxation by state laws. *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907.

91. Liability of real property to national banks to taxation.—First Nat. Bank *v.* Province, 20 Mont. 374, 51 Pac. 821; *People v. National Bank*, 123 Cal. 53, 55 Pac. 685, 45 L. R. A. 747, 69 Am. St. Rep. 32; *First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988; *Covington City Nat. Bank v. Covington*, 21 Fed. 484.

Under Act Pa. June 10, 1881, entitled “A supplement to an act entitled ‘An act to provide revenue by taxation,’ approved the seventh day of June, 1879,” the real estate of a national bank is subject to taxation distinct from its other capital. *Second Nat. Bank v. Caldwell*, 13 Fed. 429.

Real estate owned by a national bank must be assessed against the bank, but not at a higher percentage than other real estate of the same character situated in the county and municipality where the tax is sought to be levied. *First Nat. Bank v. Albright*, 13 N. Mex. 514, 86 Pac. 548, affirmed in 208 U. S. 548, 52 L. Ed. 614, 28 S. Ct. 349.

The city of Covington assessed a tax for municipal purposes upon the surplus fund and undivided profits, the real estate and improvement used as a banking house, real estate bought at judicial sales for the purpose of recovering an indebtedness to the bank, and the office furniture of the national banks, complainants herein. The statutes of Kentucky impose an annual tax of 50 cents on each share of stock, equal to \$100, in any national bank within the state. A similar tax is imposed upon state banks and corporations of loan and discount. Other corporations are assessed upon their corporate property, but stockholders

are exempted from listing for taxation shares in such corporations. Held that, in the light of the decisions of the court of appeals construing these statutes, the corporate property of banks organized under the laws of Kentucky is not taxable beyond the tax of 50 cents per share of \$100, and that the same rule applies to taxation of national banks, and therefore that the furniture and real estate of complainants are exempted from such municipal taxation. *Covington City Nat. Bank v. Covington*, 21 Fed. 484.

The banking office and lot lawfully owned and occupied as a place of business by a national bank, created under the act of congress, is not under Laws 1874, c. 1, which requires the assessment of the capital stock of corporations at its actual value, without deduction on account of real property held by the bank, liable to assessment and taxation as real estate against the bank. *Rice v. Citizens' Nat. Bank*, 23 Minn. 280.

The dwelling house and lot owned by a national bank, and occupied by its cashier as a residence, but paid for out of the profits of the bank, and also its lot and bank buildings used entirely for banking purposes, are liable to an ordinary tax on real estate for county purposes, though the bank has paid to the state its six-mill tax on the par value of its shares, under the Act of 1879. *Chester v. National Bank (Pa.)*, 1 Chest. Co. Rep. 130.

A national bank having paid into the state treasury the tax of 1 per centum of the par value of its stock, under the Act of March 31, 1870, its banking house, which was a part of its capital, represented by shares of stock, is not liable to taxation for county purposes; the banking house was a part of the capital of the institution represented by its shares of stock, and a tax on the par value of the shares was a tax upon it. *Farmers', etc., Nat. Bank v. Greene (Pa.)*, 12 Lanc. Bar 162.

Under Texas Rev. St. 1879, the real estate of national banks is not subject to taxation. *Rosenburg v. Weekes*, 67 Tex. 578, 4 S. W. 899.

Deduction of capital invested in taxed real estate.—Gen. St. 1888, § 3832, provides for the taxation of property of every corporation whose stock is not

§ 326 (2bc) National Bank Shares—§ 326 (2bca) In General.
—Taxation of Shares Authorized by Act of Congress.—The shares of national banks in the hands of individual shareholders are, by the act of congress authorizing such associations, expressly placed within the reach of the taxing power of the states.⁹² Section 5219 of the Revised Statutes

taxable and whose property is not exempt by law. Section 3833 provides that real estate owned by any corporation not required in its business shall be taxable as provided in the preceding section. Section 3836 provides that shares of capital stock of national banks shall be taxed to the shareholders, but so much of the capital as may be invested in real estate on which it pays the tax shall be deducted from the market value of its stock. Held, that land used by a national bank in the transaction of its business, though not subject to direct taxation, was taxed as a part of its capital stock, and hence there was no unconstitutional exemption of such property from taxation. *Middletown Nat. Bank v. Middletown*, 74 Conn. 449, 51 Atl. 138.

92. National bank shares subject to state taxation.—*United States*.—*Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344; *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189; *National Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772; *Van Slyke v. Wisconsin*, 154 U. S. 581, 20 L. Ed. 240, 14 S. Ct. 1168; *First Nat. Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *Citizens' Nat. Bank v. Commonwealth*, 217 U. S. 443, 54 L. Ed. 832, 30 S. Ct. 532; *First Nat. Bank v. Farwell*, 7 Fed. 518, 10 Biss. 270; *Exchange Nat. Bank v. Miller*, 19 Fed. 372; *Whitney Nat. Bank v. Parker*, 41 Fed. 402; *First Nat. Bank v. Stone*, 88 Fed. 409; *Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396; *Hager v. Louisville Nat. Banking Co.*, 86 C. C. A. 340, 159 Fed. 402.

Alabama.—*Sumter v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

Arkansas.—*First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988.

California.—*McHenry v. Downer*, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; *First Nat. Bank v. San Francisco*, 129 Cal. 96, 61 Pac. 778.

Idaho.—*People v. Moore*, 1 Idaho 504.

Illinois.—*People v. Bradley*, 39 Ill. 130.

Iowa.—*Morseman v. Younkin*, 27 Iowa 350.

Indiana.—*Wright v. Stilz*, 27 Ind. 338; *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185; *Stiltz v. Tutewiler* (Ind.), Wils. 507.

Kentucky.—*Scobee v. Bean*, 109 Ky. 526, 22 Ky. L. Rep. 1076, 59 S. W. 860; *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Maine.—*Abbott v. Bangor*, 54 Me. 540.

Massachusetts.—*Austin v. Boston*, 14 Allen 359; *Flint v. Boston*, 99 Mass. 141, 96 Am. Dec. 713.

Michigan.—*First Nat. Bank v. St. Joseph*, 46 Mich. 526, 9 N. W. 838; *Davis v. Kalamazoo*, 1 Mich. N. P. 16.

Minnesota.—*Smith v. Webb*, 11 Minn. 500, Gil. 378.

Missouri.—*Lionberger v. Rowse*, 43 Mo. 67; *First Nat. Bank v. Meredith*, 44 Mo. 500; *Curtis v. Ward*, 58 Mo. 295; *Clapp v. Ward*, 58 Mo. 296.

New Jersey.—*Fox v. Haight*, 31 N. J. L. 399; *Jewell v. Hart*, 31 N. J. L. 434; *De Baun v. Smith*, 55 N. J. L. 110, 25 Atl. 277; *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586, affirmed in 65 N. J. L. 549, 48 Atl. 582.

New York.—*Utica v. Churchill*, 33 N. Y. 161; *First Nat. Bank v. Francher*, 48 N. Y. 524; *Utica v. Churchill*, 43 Barb. 550.

North Carolina.—*Kyle v. Fayetteville*, 75 N. C. 445.

Ohio.—*Parker v. Siebern*, 3 O. Dec. 526; *Frazier v. Siebern*, 16 O. St. 614.

Pennsylvania.—*Mintzer v. Montgomery*, 54 Pa. 139; *Pittsburgh v. First Nat. Bank*, 55 Pa. 45.

Texas.—*Harrison v. Vines*, 46 Tex. 15; *Adair v. Robinson*, 6 Tex. Civ. App. 275, 25 S. W. 734; *First Nat. Bank v. Lampasas*, 33 Tex. Civ. App. 530, 78 S. W. 42.

Utah.—*Salt Lake City Nat. Bank v. Golding*, 2 Utah 1; *First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

Washington.—*Baker v. King*, 17 Wash. 622, 50 Pac. 481; *Pacific Nat.*

of the United States permits the states to assess and tax the shares of shareholders in national banks, with the limitations only "that the taxation shall not be at any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;" and that the shares of non-residents "shall be taxed in the city or town where the bank is located, and

Bank v. Pierce, 20 Wash. 675, 56 Pac. 936.

West Virginia.—Old Nat. Bank v. Berkley County Court, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. 584.

Wisconsin.—Bagnall v. State, 25 Wis. 112.

It is within the constitutional power of congress to waive the right of exempting public stocks from state taxation, and this has been done by Act Cong. 1864, c. 106, § 41, so far as stockholders in national banks can be considered as the owners of public stocks held by such banks. *Utica v. Churchill*, 33 N. Y. 161.

Under Const. Minn. art. 9, § 3, providing that "laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property," the legislature has authority to pass laws for the manner prescribed by Act Cong. June 3, 1864. *Smith v. Webb*, 11 Minn. 500, Gil. 378.

The owners of shares of stock in a national bank may be compelled to list them for taxation. *Commonwealth v. Jackson*, 22 Ky. L. Rep. 1788, 61 S. W. 700.

Code 1876, § 369, subd. 7, cl. 2, providing for the collection of a state tax on national bank shares, and providing that such taxation shall be in lieu of all other state, county, and municipal taxation on such shares, is contrary to the constitutional provision subjecting the property of corporations to taxation the same as of individuals. *Sumter v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

When a state law taxes shares of national bank stock, it taxes the same interest of the stockholder that he would transfer on a sale of his certificate; and therefore the tax of 50 cents a share imposed by the statutes of Kentucky, as above, is a tax on the whole interest of the stockholder represented by his stock, including his interest as such in the surplus and undivided profits, as well as the authorized capital and assets of the bank. *Covington City Nat. Bank v. Covington*, 21 Fed. 484.

Act Ky. March 21, 1900 (Acts 1900, p. 65, c. 23), providing for the taxation of shares of national banks, is valid and enforceable, as applied to taxes for subsequent years, and a bank is not exempted from its operation because of its acceptance of the provisions of the Hewitt Act of 1886 (Acts 1885-86, p. 140, c. 1233), which, as has been authoritatively determined, did not create an irrevocable contract with the state. *First Nat. Bank v. Covington*, 129 Fed. 792, affirmed in *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. Ed. 963, 25 S. Ct. 562.

Shares of stock in national banks can be assessed as any other personalty, regardless of Act Arizona, April 13, 1893, § 3, requiring bank officers to give the assessor a statement of the names of stockholders and the amounts of their stock, on penalty of being held personally liable for the taxes, as that section does not provide for ascertaining the amount of taxes due, and was merely intended to find the ownership of the shares for the purpose of assessment. *Consolidated Nat. Bank v. Pima*, 5 Ariz. 142, 48 Pac. 291.

Taxability for schools, municipal or local purpose.—Under the Pa. Act March 31, 1870, the shares of national banks are taxable for county schools, municipal, and local purposes in the hands of the shareholders in the places of their residence. *Strong v. O'Donnell* (Pa.), 32 Leg. Int. 283.

National bank shares in the hands of the individual owners are not liable to taxation for school purposes where the bank has failed to collect six mills upon the net par value, under Act Pa. June 1, 1889, § 25, but within thirty days after notice from the auditor general has paid the three-mill tax upon the actual value of the stock assessed by the auditor general under § 26. *Gorley v. Bowlby*, 8 Pa. Co. Ct. Rep. 17.

Since Ky. St. 1903, §§ 3531-3549, provide a system for the assessment and collection of municipal taxes on all property liable thereto, for fourth-class cities, shares of stock of national banks should not be listed, for the purposes of a fourth-class municipal-

not elsewhere." This was the Act of February 10, 1868, 15 Stat. 34, ch. 7, and modified the Act of 1864 so that the validity of such state taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in state banks.⁹³ With the exception of these conditions, the power of the states to impose a tax upon shares of the stock of national banks in the hands of stockholders is unrestricted.⁹⁴ It may be laid on such

ity, in the county court, under Ky. St. 1903, § 4241, providing for the listing of omitted property, and Act March 21, 1900 (Acts 1900, p. 65, c. 23), relative to taxation of national bank stock. *Citizens' Nat. Bank v. Commonwealth*, 118 Ky. 51, 25 Ky. L. Rep. 2254, 80 S. W. 479, rehearing denied in 26 Ky. Rep. 62, 81 S. W. 686; *Farmers' Nat. Bank v. Commonwealth (Ky.)*, 80 S. W. 1193.

New shares not taxable until increase of capital approved by comptroller.—Where a national bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for, before January 1, 1872, and a semi-annual dividend, declared as of that day, was paid upon new shares as well as of old, but such increase of capital was not approved by the comptroller of the currency, nor his certificate issued until January 5, 1872, held, that such new shares were not the subjects of taxation under an ordinance imposing a tax on bank shares "in the hands of the taxpayers January 1, 1872." *Charleston v. People's Nat. Bank*, 5 S. C. 103, 22 Am. Rep. 1.

93. Section 5219, Rev. Stat.—*Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394; *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829; *Stanley v. Albany*, 121 U. S. 535, 542, 30 L. Ed. 1000, 7 S. Ct. 1234; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706; *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721; *Hepburn v. School Directors (U. S.)*, 23 Wall. 480, 23 L. Ed. 112.

For comparison of provisions of Acts of 1863, 1864 and 1868, see *Van Allen v. Assessors (U. S.)*, 3 Wall. 573, 18 L. Ed. 229; *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721. See, also, *Tappan v. Merchants' Nat. Bank (U. S.)*, 19 Wall. 490, 22 L. Ed. 189; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Owensboro*

Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

"In *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721, it was held that the proviso originally contained in the Act of 1864, and omitted from the Act of 1868, expressly referring to state banks, was limited to state banks of issue." *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

94. North Ward Nat. Bank v. New-ark, 39 N. J. L. 380.

Act Ky. 1906, providing the method of taxing state and national banks and trust companies "upon each one hundred dollars of value of the shares" of such banks and companies, as construed by the court of appeals of the state, is not invalid as to national banks under the federal law, as imposing the tax upon their capital and surplus, and not on their shares. *Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396; *Hager v. Louisville Nat. Banking Co.*, 86 C. C. A. 340, 159 Fed. 402.

Though the local assessor could not assess shares of stock in a national bank previous to the time Act June 11, 1906, took effect, as previous to that time he had no such authority, and though he was required by previous statutes to return his book, and the assessment was completed before the act took effect, the legislature which had imposed upon him these duties could impose others upon him, and did so by providing for a local assessment of the shares of bank stock for local purposes. *Richardson v. State Nat. Bank*, 135 Ky. 772, 123 S. W. 294, 1189.

Not taxable unless authorized by statute.—The Revenue Act of Idaho, in force in 1871, did not authorize the assessment or taxation of shares of national bank stock in the hands of individuals or corporations. *People v. Moore*, 1 Idaho 504.

Under the laws in force in 1865-66, shares of national bank stock were

shares, although the capital of the bank is invested in United States securities,⁹⁵ or nontaxable bonds,⁹⁶ and may be assessed for purposes of taxa-

not subject to taxation. *People v. McCaill*, 43 Ill. 286.

Act April 30, 1864, imposing additional taxes for state purposes, etc., providing that every incorporated and unincorporated banking and saving institution and deposit and trust company, and all other companies and corporations doing business in the commonwealth, not paying a tax to the state on dividends, under existing laws, shall annually, on November 1st of each year, report the amount of net earnings or income, and pay a tax thereon, does not impose a tax on national banks formed afterwards; for while all national banks may be taxed by the state conformably to the act of congress, a tax can not be imposed by mere implication, but should be done directly. *Commonwealth v. Girard Nat. Bank* (Pa.), 6 Phila. 431.

A statute authorizing taxes to be assessed upon "all shares in moneyed corporations," includes shares in national banks. *Stetson v. Bangor*, 56 Me. 274.

Under a statute requiring to be returned for taxation all shares or stock in moneyed or banking associations or institutions, cash on hand or deposit, and money at interest, it was competent to assess shares held by a taxpayer in the national bank of Texas, though such assessment was supplemental. *Dean v. Kopperl*, 1 Tex. App. Civ. Cases, § 746.

95. Notwithstanding investment of capital in national securities.—*Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344; *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433; *Provident Inst. v. Massachusetts* (U. S.), 6 Wall. 611, 18 L. Ed. 907; *National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 19 L. Ed. 701; *Lionberger v. Rouse* (U. S.), 9 Wall. 468, 19 L. Ed. 721; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571. See, also, *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324; *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829; *Snyder v. Betman*, 190 U. S. 249, 47 L. Ed.

1035, 23 S. Ct. 803; *First Nat. Bank v. Farwell*, 7 Fed. 518, 10 Biss. 270.

Illinois.—*People v. Bradley*, 39 Ill. 130.

New Jersey.—*Fox v. Haight*, 31 N. J. L. 399; *Jewell v. Hart*, 31 N. J. L. 434.

New York.—*Utica v. Churchill*, 33 N. Y. 161.

Ohio.—*Frazer v. Siebern*, 16 O. St. 614.

Texas.—*Harrison v. Vines*, 46 Tex. 15; *Adair v. Robinson*, 6 Tex. Civ. App. 275, 25 S. W. 734.

Act Cong. June 3, 1864, § 41, provides that shares in a national bank may be assessed, "but not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens in such state." Held, that shares in such banks might be assessed, without regard to the fact that the capital of such banks was invested in bonds of the United States declared by statutes creating them to be exempt from taxation, though in assessing other corporations allowance was made to them on account of such United States securities held and owned by them. *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344.

The revenue law of 1868, exempting "all shares of the capital stock of corporations which are required to list their property for taxation," does not apply to shares of the stock of a national bank whose capital consists mainly, if not entirely, of United States bonds, which the corporation is not required to list for taxation. *McIver v. Robinson*, 53 Ala. 456.

The states may lawfully exempt investments of other moneyed capital in such securities, without allowing a deduction on that account to national banks' shareholders. *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, distinguishing *Van*

96. Notwithstanding investment of capital stock in nontaxable bonds.—

A state may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank is invested in nontaxable bonds, as taxation of the shares is not taxation either of the capital stock or of the nontaxable bonds. *First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988.

tion at an amount above its par value, if such valuation is made by the state law on other moneyed capital in the assessment of taxes;⁹⁷ and be separated from the person of the owner, and given a situs of its own for the purposes of taxation.⁹⁸ To justify a state in taxing shares of stock in national banks, subject to the condition of Act Cong. June 3, 1864, § 41, providing that such tax shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located, it is not necessary that there should be any state banks in existence.⁹⁹ The mode in which the taxes shall be assessed and collected, and the place where it shall be laid upon resident stockholders, are left to the discretion of the legislators of the state in which the banks are respectively located.¹ By Rev.

Allen v. Assessors (U. S.), 3 Wall. 573, 18 L. Ed. 229. See, also, *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629.

A statutory rule fixing the value of the shares of a national bank for purposes of state tax, which does not permit a deduction therefrom for the amount of United States bonds or other nontaxable securities held by the bank, is not in conflict with the constitution of Ohio, nor with the law of congress authorizing taxation on such shares. *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

That the value of the shares of a national bank includes value due to nontaxable United States bonds owned by the bank is no objection to the validity of an assessment of such shares for taxation by a state without excluding the value of the bonds. *Hager v. American Nat. Bank*, 86 C. C. A. 334, 159 Fed. 396; *Hager v. Louisville Nat. Banking Co.*, 86 C. C. A. 340, 159 Fed. 402.

A shareholder in a bank whose capital is invested in government securities is not a holder of such securities, and an assessment upon his shares is not an assessment of the securities held by the bank. *People v. Assessors* (N. Y.), 44 Barb. 149, 29 How. Prac. 371.

Shares and capital distinct.—*National Bank v. Commonwealth* (U. S.), 9 Wall. 353, 359, 19 L. Ed. 701; *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537.

That the capital of a bank is invested in United States bonds does not effect the right of the state to tax the shares under the act of congress. A tax upon the shares of a bank is not

a tax upon the property or capital of the bank. *Wright v. Stilz*, 27 Ind. 338.

⁹⁷. *North Ward Nat. Bank v. Newark*, 39 N. J. L. 380; *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112.

⁹⁸. *North Ward Nat. Bank v. Newark*, 39 N. J. L. 380; *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189. See post, "Place of Taxation," § 328.

Taxable whether owned by residents or nonresidents.—Shares in a national bank are taxable under state laws, whether owned by residents or nonresidents. *Kyle v. Fayetteville*, 75 N. C. 445.

Nothing in Const. Ill. 1848, art. 9 (which was still in force in 1867), prevented the legislature of the state from providing for the taxation of the owners of shares of the capital stock of a national bank in that state, at the place within the state where the bank was located, without regard to their places of residence. *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

Shares owned by nonresidents.—Statutes of Maine, as they were in 1865 and 1866, taken in connection with Act Cong. June 3, 1864, c. 106, §§ 40, 41, did not authorize the assessment of taxes for state, county, and municipal purposes upon stock of national banks owned by nonresidents. *Abbott v. Bangor*, 54 Me. 540.

⁹⁹. **Existence of state banks not essential to right of state to tax.**—*Smith v. Webb*, 11 Minn. 500, Gil. 378.

¹. *North Ward Nat. Bank v. Newark and Assessment*, § 329.

The Wisconsin Act of 1868, c. 136—which provides for the reassessment and collection of delinquent taxes of 1865 and 1866, on the shares of na-

St., § 5219, the states are restricted, in taxing national banks, to taxing the shares, as distinguished from taxing the banks as such, or the capital, and can not evade this restriction by requiring the value of the property of the bank to be added to the value of the shares.² Assessments of national bank stock should be made against the shareholders personally,³ and an assess-

tional banks in Wisconsin—is not in conflict with the provisions of § 41 of The National Banking Act, which permits taxation by state authority of the shares of national banks. *Bagnall v. State*, 25 Wis. 112.

2. States restricted to taxing shares as distinguished from taxing banks as such.—*St. Louis Nat. Bank v. Papin*, Fed. Cas. No. 12,239, 4 Dill. 29.

Assessments of capital stock of a national bank must, under Comp. Laws 1897, § 257, be assessed against each individual shareholder, and not as a whole against the bank. *First Nat. Bank v. Albright*, 13 N. Mex. 514, 86 Pac. 548, affirmed in 208 U. S. 548, 52 L. Ed. 614, 28 S. Ct. 349.

Shares of stock in a national bank are to be taxed in the name of the shareholder; there being nothing in the nature of the tax to require that it shall be in the name of the bank. *Miller v. Fourth Nat. Bank*, 9 O. Dec. 291, 12 Wkly. L. Bull. 66.

Taxes on the capital stock of a national bank in the hands of a receiver are levied on the shares of stock, as personal property of the holder of such stock, and are recoverable against the owner and holder of such shares of stock, and not against the bank or its assets. Judgment, *United States Nat. Bank v. Logan County (Okla.)*, 51 Pac. 97, modified. *Gray v. Logan*, 7 Okla. 321, 54 Pac. 485.

The state tax must be assessed directly against the shares of the stockholders in national banks. *State v. Dowling*, 50 Mo. 134.

Act Feb. 4, 1864, being "An act for the assessment and collection of revenue in the state of Missouri," by which the assessment of the shares of a bank is distinctly and separately required to be made against the shares, thereby rendering the shareholders liable, is in consonance with Act Cong. June 3, 1864, amendatory of an act to provide a national currency secured by a pledge of the United States stocks (Laws U. S. 1863-64, p. 112), requiring that the tax imposed by state authorities on shareholders in national banking associations must be specifically assessed against the shareholders, and not

against the capital of the bank itself. *Lionberger v. Rowse*, 43 Mo. 67.

Under Laws 1874, p. 213, requiring owners to make returns of property for taxation, a national bank was not liable to pay state and county taxes for that year, assessed on shares of stock owned by individuals. "Share" and "stock" are used synonymously. *Waco Nat. Bank v. Rogers*, 51 Tex. 606.

As Rev. St. U. S., § 5219 [U. S. Comp. St. 1901, p. 3502], permits taxation by states of the real estate only of national banks, such a bank is under no legal obligation to render and pay taxes on its stock. *First Nat. Bank v. Lampasas*, 33 Tex. Civ. App. 530, 78 S. W. 42.

A national bank having voluntarily rendered its capital stock for taxation, and stated, in its answer, in an action to recover the taxes thereon, as increased in value on equalization, that it was willing to pay taxes thereon according to its rendition, it may be held liable for the taxes on the value of its stock as rendered, though taxation of such stock is unauthorized; but an equalization board could not, without its consent, augment its conceded liability by adding other personal property to its rendition, or raising the value of that which had been rendered. *First Nat. Bank v. Lampasas*, 33 Tex. Civ. App. 530, 78 S. W. 42.

The shares of stock of a national bank are taxable to the owners, and the bank is not liable primarily, or as the agent of the shareholders, under the act of congress, or the revenue laws of New Mexico, for the payment of a tax levied upon such shares. *Albuquerque Nat. Bank v. Perea*, 5 N. Mex. 664, 25 Pac. 776.

The act providing that "it shall be the duty of the said banks to retain and pay the amount of tax assessed to each of the said stockholders thereof out of the dividends from time to time declared" does not make the taxes a charge against the bank, either in form or substance. *Farmers' Nat. Bank v. Cook*, 32 N. J. L. 347.

3. Assessment must be against shareholders personally.—*First Nat. Bank v. Meredith*, 44 Mo. 500.

ment in a lump sum of all the personal property of a national bank to the bank itself can not be regarded as one against the stockholders on their shares.⁴ Refusal of the officers to furnish the assessor with a list of shareholders does not justify making the assessment and enforcing the tax against the bank property.⁵

Shares Owned by Another National Bank.—The manifest intention

4. *Stapylton v. Thaggard*, 33 C. C. A. 353, 91 Fed. 93.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], which declares that nothing in the National Banking Act shall prevent all the shares of stock of a national bank from being included in the assessment of the personal property of the owners of such shares, an assessment of the entire stock of a national bank in solido against the bank itself is invalid. *National Bank v. Richmond*, 42 Fed. 877; *First Nat. Bank v. Fisher*, 45 Kan. 726, 26 Pac. 482.

There is no authority in the statutes of Ohio, nor of the United States, for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax-list in the names of the respective owners. *Miller v. First Nat. Bank*, 46 O. St. 424, 21 N. E. 860.

An annual tax, authorized by act of legislature, passed Jan. 4, 1859, to be levied, assessed, and collected by the city of Pittsburg, upon the average quarterly business of banks and banking institutions, is not within the terms of § 41 of the act of congress, June 3, 1864, which authorizes taxation of national banks by a state under limitation, because it is not a tax upon the shares of the shareholders of banks. *Pittsburg v. First Nat. Bank*, 55 Pa. 45.

Under Code, § 1322, providing that shares of stock in national banks shall be assessed to the individual stockholders at the place where the bank is located, stock in national banks must be assessed against the stockholders and on the corporate stock as such, and the bank can not be assessed therefor. *Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605.

The Montana statute (Pol. Code, § 3692) provides for assessing shares of bank stock to the owners thereof, and, to aid the assessors in determining their value, requires the bank to furnish a verified statement showing the amount and number of shares of its capital

stock, surplus, etc. An assessor, instead of demanding the statement here required, presented to a national bank a blank form for listing property subject to taxation. The bank did not return a verified list, but its assistant cashier handed to the assessor a statement beginning, "Capital, \$800,000," followed by items of surplus, undivided profits, United States bonds, and real estate. The assessor deducted the amount of the bonds and real estate from the "capital" and assessed the remainder to the bank, as stock. Held, that the tax was illegal, as the capital of national banks is exempt from taxation under the federal laws, and as both the state and federal laws require the shares to be taxed to their owners; and that the form of the return did not warrant the assumption that the bank owned its own shares. *Brown v. French*, 80 Fed. 166.

A bank-stock assessment contained the names of the shareholders, and the correct number of shares owned by each. Held, that the intent was not to tax the capital stock, but the shares owned by the individual shareholders. *Western, etc., Banking Co. v. Murray*, 6 Ariz. 215, 56 Pac. 728.

An assessment on the capital stock of a national bank by an aggregate or gross assessment is irregular and invalid, as such assessment should be against the individual shareholders. *Sumter v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

Under Rev. St., §§ 5214, 5219, providing that, in lieu of all taxes to the United States, a banking association shall pay to the treasurer a certain duty, provided that nothing therein shall prevent all the shares in the association from being included in the valuation of personal property of the owner of the shares in assessing taxes imposed by the authority of the state in which the association is located, an assessment on the shares in gross, or on the capital stock of a bank, against the corporation, is not authorized. *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15.

5. *Springfield v. First Nat. Bank*, 87 Mo. 441.

of the law is to permit the state in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of capital stock of another national bank by reason of that ownership, on the same footing with all other shares.⁶

Shares Held by Savings Bank.—Stock of national banks in one state, held by a savings bank of another state, are taxable in the first state though the property of the savings bank is exempt by the laws of its own state.⁷

§ 326 (2bc) Prohibition of Discrimination between National Bank Shares and Other Moneyed Capital.—**In General.**—The power of the states to tax national bank shares is given subject to the express restriction that in the act of Congress such shares shall not be taxed at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state.⁸

6. Shares owned by another national bank.—*Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], which provides that all the shares of any banking association may be included in the valuation of the personal property of the owner or holder in the state within which the association is located, but each state may determine the manner of taxing the shares of national banks, a state may tax the shares of a national bank without regard to their ownership, the shares of stock of a national bank owned by another bank not being exempt by reason of such ownership. *National Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

7. Shares held by savings bank.—*People v. Coleman*, 63 Hun 633, 18 N. Y. S. 675, 45 N. Y. St. Rep. 136, affirmed in 135 N. Y. 231, 31 N. E. 1022.

8. Prohibition of discrimination between national bank shares and other moneyed capital.—*United States*.—*Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344; *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433; *Lionberger v. Rouse* (U. S.), 9 Wall. 468, 19 L. Ed. 721; *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112; *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *Albany v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5

S. Ct. 706; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, affirming 28 Fed. 776; *National Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839; *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234; *Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 S. Ct. 1244; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *National Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324, following *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, affirming *Silver Bow v. Davis*, 6 Mont. 306, 12 Pac. 688; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412; *First Nat. Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384; decree 129 Fed. 792, affirmed in *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. Ed. 963, 25 S. Ct. 562; *Richards v. Rock Rapids*, 3 Fed. 505; *National Albany Exch. Bank v. Hills*, 5 Fed. 248, 18 Blatchf. 478; *Albany City Nat. Bank v. Maher*, 6 Fed. 417, 19 Blatchf. 175; *First Nat. Bank v. Waters*, 7 Fed. 152, 19 Blatchf. 242; *First Nat. Bank v. Farwell*, 7 Fed. 518, 10 Biss. 270; *Evansville Nat. Bank v.*

Purpose of Provision.—The main purpose of congress, in fixing limitation to state taxation on investments and shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a

Britton, 8 Fed. 867, 10 Biss. 503; Supervisors *v.* Stanley, 12 Fed. 82; Stanley *v.* Albany, 15 Fed. 483, 21 Blatchf. 249; Exchange Nat. Bank *v.* Miller, 19 Fed. 372; First Nat. Bank *v.* Treasurer, 25 Fed. 749; Mercantile Nat. Bank *v.* New York, 28 Fed. 776; Richards *v.* Rock Rapids, 31 Fed. 505; First Nat. Bank *v.* Richmond, 39 Fed. 309; Whitney Nat. Bank *v.* Parker, 41 Fed. 402; First Nat. Bank *v.* Herbert, 44 Fed. 158; First Nat. Bank *v.* Lindsay, 45 Fed. 619; Puget Sound Nat. Bank *v.* King, 57 Fed. 433; Mercantile Nat. Bank *v.* Shields, 59 Fed. 952; First Nat. Bank *v.* Stone, 88 Fed. 409; First Nat. Bank *v.* Louisville, 88 Fed. 409; National Bank *v.* Baltimore, 92 Fed. 239; Mercantile Nat. Bank *v.* Hubbard, 98 Fed. 465, reversed in 45 C. C. A. 66, 105 Fed. 809, which is reversed Lander *v.* Mercantile Bank, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908; National Bank *v.* Baltimore, 40 C. C. A. 254, 100 Fed. 24; First Nat. Bank *v.* Covington, 103 Fed. 523; Peoples Nat. Bank *v.* Marye, 107 Fed. 570; modifying and affirming 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68; Nevada Nat. Bank *v.* Dodge, 56 C. C. A. 145, 119 Fed. 57; decree 139 Fed. 792, affirmed in Covington *v.* First Nat. Bank, 198 U. S. 100, 49 L. Ed. 963, 25 S. Ct. 562; City Nat. Bank *v.* Paducah, Fed. Cas. No. 2,743, 2 Flap. 61; First Nat. Bank *v.* Douglas, Fed. Cas. No. 4,799, 3 Dill. 330.

Alabama.—National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15; Pollard *v.* State, 65 Ala. 628; Maguire *v.* Board, 71 Ala. 401.

Arizona.—Consolidated Nat. Bank *v.* Pima, 5 Ariz. 142, 48 Pac. 291.

California.—Miller *v.* Heilbron, 58 Cal. 133; McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737.

Illinois.—Illinois Nat. Bank *v.* Kinsella, 201 Ill. 31, 66 N. E. 338.

Indiana.—Wright *v.* Stitz, 27 Ind. 338; Wasson *v.* First Nat. Bank, 107 Ind. 206, 8 N. E. 97; First Nat. Bank *v.* Turner, 154 Ind. 456, 57 N. E. 110.

Iowa.—Hubbard *v.* Johnson, 23 Iowa 130; National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234; First Nat. Bank *v.* Esterville, 150 Iowa, 95, 129 N. W. 475; Des Moines Nat. Bank *v.* Des Moines, 153 Iowa 336, 133 N. W. 767.

Kansas.—First Nat. Bank *v.* Fisher, 45 Kan. 726, 26 Pac. 482.

Kentucky.—Commonwealth *v.* First Nat. Bank (Ky.), 4 Bush 98, 96 Am. Dec. 285; Deposit Bank *v.* Daviess, 102 Ky. 174, 19 Ky. L. Rep. 248, 39 S. W. 1030, 44 L. R. A. 825; Scobee *v.* Bean, 109 Ky. 526, 22 Ky. L. Rep. 1076, 59 S. W. 860; Marion Nat. Bank *v.* Burton, 121 Ky. 876, 28 Ky. L. Rep. 864, 90 S. W. 944, 10 L. R. A., N. S., 947; Schuster & Co. *v.* Louisville, 124 Ky. 189, 28 Ky. L. Rep. 588, 89 S. W. 689; Commonwealth *v.* Covington Nat. Bank, 7 Ky. L. Rep. 48.

Maine.—Stetson *v.* Bangor, 56 Me. 274.

Massachusetts.—Providence Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407.

Michigan.—First Nat. Bank *v.* St. Joseph, 46 Mich. 526, 9 N. W. 838.

Missouri.—Lionberger *v.* Rowse, 43 Mo. 67, affirmed in Lionberger *v.* Rouse (U. S.), 9 Wall. 468, 19 L. Ed. 721.

Montana.—Silver Bow *v.* Davis, 6 Mont. 306, 12 Pac. 688.

Nebraska.—Bressler *v.* Wayne, 32 Neb. 834, 49 N. W. 787, 13 L. R. A. 614, overruling 25 Neb. 468, 41 N. W. 356.

New Jersey.—Matheson *v.* Boyd, 32 N. J. L. 273; North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380; Stratton *v.* Collins, 43 N. J. L. 562; Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 46 Atl. 586, affirmed in 65 N. J. L. 549, 48 Atl. 582.

New York.—Gallatin Nat. Bank *v.* Commissioners, 67 N. Y. 516; Williams *v.* Weaver, 75 N. Y. 30; judgment 163 N. Y. 320, 57 N. E. 408, affirmed in Jenkins *v.* Neff, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905; S. C., 29 Misc. Rep. 59, 60 N. Y. S. 582, order affirmed in 163 N. Y. 320, 57 N. E. 408; In re Jenkins, 47 App. Div. 394, 62 N. Y. S. 321; McMahon *v.* Palmer, 11 Daly 214; People *v.* Coleman, 44 Hun 47; People *v.* Assessors, 44 Barb. 148, 29 How. Prac. 371.

North Carolina.—McAden *v.* Mecklenburg, 97 N. C. 355, 2 S. E. 670.

Ohio.—Frazer *v.* Siebern, 16 O. St. 614; Chapman *v.* First Nat. Bank, 56 O. St. 310, 47 N. E. 54; Cleveland Trust Co. *v.* Lander, 62 O. St. 266, 56 N. E. 1036, affirmed in 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394; First Nat. Bank

like character.⁹ The language of the act of congress is to be read in the

v. Chapman, 4 O. C. D. 252, 9 O. C. C. 79.

Oregon.—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

Pennsylvania.—*Everett's Appeal*, 71 Pa. 217; *Gorgas's Appeal*, 79 Pa. 149; *Boyer's Appeal*, 103 Pa. 387; *Pleish v. Hartranft*, 1 Leg. Gaz. R. 46; *Markoe v. Hartranft*, 15 Am. L. Reg. 487.

Tennessee.—*McLaughlin v. Chadwell*, 54 Tenn. (7 Heisk.) 389.

Texas.—*Engelke v. Schlender*, 75 Tex. 559, 12 S. W. 999; *Primm v. Fort*, 23 Tex. Civ. App. 605, 57 S. W. 86, rehearing denied in 57 S. W. 972.

Utah.—*Judgment* 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346, affirmed in *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863.

Vermont.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Virginia.—*Burrows v. Smith*, 95 Va. 694, 29 S. E. 674.

Washington.—*First Nat. Bank v. Chehalis*, 6 Wash. 64, 32 Pac. 1051; *Washington Nat. Bank v. King*, 9 Wash. 607, 38 Pac. 219; *Newport v. Mudgett*, 18 Wash. 271, 51 Pac. 466; *Pacific Nat. Bank v. Pierce*, 20 Wash. 675, 56 Pac. 936; *Van Slyke v. State*, 23 Wis. 655.

"As clearly established by many decisions, and particularly by that announced in the case of *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 S. Ct. 537, all state laws providing for the taxation of shares of national banks must be subject to the provisions of § 5219, Rev. St. of the United States, which is in this language: 'Section 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real prop-

erty of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.'" *First Nat. Bank v. Covington*, 103 Fed. 523.

9. Purpose.—*Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701; *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905; *Stanley v. Albany*, 121 U. S. 535, 549, 30 L. Ed. 1000, 7 S. Ct. 1234.

Congress meant no more by the second limitation in the proviso to § 41 of The National Banking Act of 1864, limiting state taxes on national banks to the rate imposed upon state banks, than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that the state should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation. *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721.

If the rate of taxation by the state on such shares is the same as, or not greater than, upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." *People v. Commissioners (U. S.)*, 4 Wall. 244, 18 L. Ed. 344. See also, *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

The restriction upon the power of a state to tax the shares of any national bank within its borders "at a greater rate than is assessed upon other moneyed capital in the hands of indi-

light of this policy.¹⁰ If the state and national banks were treated equally, the latter were not assessed at a greater rate than the former; national bank shareholders were not, in such event, illegally assessed, unless there were a clear discrimination in favor of moneyed capital other than that employed in either state or national banks.¹¹ The provision of the statute now under

vidual citizens of such state" (Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502]) is intended to secure equality of valuation in the assessment of the stock, as well as equality in the rate of the tax after the assessment has been made. *Albany City Nat. Bank v. Maher*, 6 Fed. 417, 19 Blatchf. 175.

10. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Section 5219, Rev. Stat., does not forbid discrimination between national banks, but only as between such banks and state banks, or other moneyed capital in the hands of private individuals. Where the legislation treats state banks and national banks alike; gives to each the same privileges; there is no discrimination against national banks as such.

Only between national banks and other moneyed capital.—*Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

Where a state statute allows any bank to collect from its shareholders an annual tax of eight mills on the par value of the stock, in lieu of any other tax except on the real estate, there is no discrimination, because as to those state banks that do not elect to pay the eight mills the auditor general is required to look to the stockholders directly for the regular four mills tax, whereas to national banks he reaches the stockholder through the bank itself, and hence it is said that some shareholders in state banks may escape taxation. But this is a mere matter of procedure. It is no objection to the law that it makes the national bank the agent to collect and does not compel the state bank to do the same. *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

The fact that it is possible, under the operation of this law that one bank may pay at a less rate upon the actual value of its banking property than another, but the banks which do not make this election, whether state or national, pay no more than the regular tax, does not invalidate it. The result of the election under the circumstances is simply that those electing pay less.

This lack of uniformity in the result furnishes no ground for complaint under the federal constitution. *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

11. **Between state and national banks.**—*First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829; *Lionberger v. Rouse* (U. S.), 9 Wall. 468, 19 L. Ed. 721, construing act of 1864; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407, construing Rev. Stat. Ohio, § 2762.

Omission to tax state banks.—Under the National Banking Act of 1864, 13 Stat. 111, in the case of *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229, the taxing law of New York, which was in question, was held to be invalid, because it levied no taxes upon shares in state banks at all, the tax being assessed upon the capital of the banks after deducting that portion which was invested in securities of the United States; and it was held that this tax on the capital was not a tax on the shares of the stockholders equivalent to that on the shares of national banks. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. See, also, *People v. Commissioners*, 94 U. S. 415, 24 L. Ed. 164; *S. C.*, 4 Wall. 244, 18 L. Ed. 344; *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433.

Where a state, having disabled itself with a contract with the only two banks of issue in the state from collecting a tax above a certain amount from them, and having other banks not of issue possessed of greater capital than those of issue, laid a tax on all shares of stock in banks and incorporated companies generally, held, that the fact that the state could not collect a tax beyond a certain amount in the two banks of issue which it had at that time was no bar to the collection of the tax on the shares of the national banks for a greater amount. *Lionberger v. Rouse* (U. S.), 9 Wall. 468, 19 L. Ed. 721.

consideration was not intended to prohibit the exemption of particular kinds of property.¹² A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed,¹³ and where a state imposes upon the state banks a tax on their capital (the shares in the hands of the shareholders being exempt from tax), it can not lay a tax on national bank shares.¹⁴

Provision Construed and Applied.—The provision of the United States Revised Statutes, respecting the taxation of national banks, does not require perfect equality between state and national banks,¹⁵ but only that

12. Not intended to prohibit exemptions.—*Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369. See post, "Exemptions," § 327.

Act Pa. March 31, 1870, declares shares of national banks taxable for county, school, municipal, and local purposes at the same rate as now is or may hereafter be assessed on other moneyed capital in the hands of individual citizens. Held, that the shares of a national bank located within the borough of Carlisle were subject to taxation for local purposes, notwithstanding a portion of other moneyed capital in the hands of individual citizens within that borough, such as mortgages, judgments, recognizances, and moneys owing on articles of agreement for sale of real estate, were exempt from taxation, except for state purposes. *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112.

The exemption of municipal bonds of the city of New York from taxation, does not render invalid the taxation of national bank shares. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, affirming 28 Fed. 776.

An exemption from taxation of deposits in savings banks is not a discrimination against national banks within Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502]. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Richards v. Rock Rapids*, 31 Fed. 505.

Act N. J. April 11, 1866, § 15, exempts from taxation thereunder corporations which, by virtue of any contract in their charters, or other contracts with this state, are expressly exempted from taxation, and except mutual life insurance companies specially taxed. It was alleged that \$301,485,000 was thus exempted, and \$24,000,000 by an exemption of deposits in savings banks. Held, that the assessments of the national banks were not invalid, on authority of *Mercantile Nat. Bank v. New York*, 121 U. S.

138, 30 L. Ed. 895, 7 S. Ct. 826; *National Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839.

13. *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433.

14. *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433; *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229.

An act of a state which has taxed shares in national banks, but which did not provide that the tax imposed should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state, is not warranted by Act Cong. June 3, 1864, subjecting such shares to state taxation, but not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens; there having been, under the legislation of the state, no tax laid on shares in state banks, although there was a tax on the capital of such banks. *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229.

"The question raised in this case came before us in the case of *Van Allen v. Assessors* (U. S.), 3 Wall. 573, 18 L. Ed. 229, from New York, where the statute taxing the state banks was substantially like that of Illinois. We there held the tax unauthorized for the defect stated. It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the state banks may consist of bonds of the United States, which were exempt from state taxation, it was not easy to see that the tax on the capital was an equivalent to tax on the shares. *Bradley v. Illinois* (U. S.), 4 Wall. 459, 18 L. Ed. 433.

15. Provision prohibiting discrimination construed and applied.—*Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73.

the system of tax in a state shall not work a discrimination favorable to its own citizens and corporations and unfavorable to holders of shares in national banks.¹⁶ That the language does not mean entire equality is evident from the fact that, if the capital of national banks were taxed at a much lower rate than other moneyed capital in the state, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of congress, for the protection of national banks.¹⁷ The provision of the Revised Statutes, now under consideration, does not require the states, in taxing their own corporations, "to conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners." If there is no unfavorable discrimination against national bank stockholders, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of congress.¹⁸ The fact that a

16. *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

Where, considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, state and national, came, as nearly as practicable to securing between them equality and uniformity of taxation, all the banks, state and national, being thus placed, as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to undervaluation of the shares of national banks, the holders could not complain. If it sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as asserted, this course was not, in the years mentioned, available to the plaintiff and the stockholders, whose interests were assigned to him, because their names were not placed on the assessment roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. *Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 S. Ct. 1244. See, also, *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234, reaffirming *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

17. *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73.

18. **Systems of taxation need not be uniform if results are.**—*Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

And because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate than that on the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against, because the taxation of such other corporations is arrived at under a separate system. *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

The fact that under the laws of California shares of stock in state banks and other state moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that Pol. Code, §§ 3609, 3610, providing for the taxation of shares in national banks constitutes an invalid discrimination against national banks, where a different method has been adopted by the state for the assessment and taxation of all the property of such state corporations embraced in the assessment of shares of stock in national banks. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

Const. 1879, art. 13, § 1, required taxation of all nonexempt property in proportion to value and defined "prop-

special system of taxation of national banks may not be as favorable as the general system of taxation in an isolated case does not render the system unlawful as discriminating against those institutions, so long as there is no intentional discrimination and no inequality in the effect upon their stock-

erty" to include moneys, credits, bonds, stocks, dues, franchises, and all other matters or things, capable of private ownership. Pol. Code, § 3607, provided that all property not exempt must be taxed, except that nothing therein contained should be construed to authorize double taxation, and § 3608 declared that shares of stock in corporations possessed no intrinsic value over the actual value of the property of the corporation, and that all such property should be assessed and taxed, but that no assessment should be made of shares of stock, nor should any holder thereof be taxed thereon. The section was subsequently amended to exclude national bank shares. Held, that since, under such provisions, all the elements of value contained in corporate stock were subject to taxation to the corporation, Pol. Code, §§ 3609, 3610, providing for the taxation of stock in national banks, did not constitute a discrimination against the latter, prohibited by Rev. St. U. S., § 5219 [U. S. Comp. St. 1901, p. 3502]. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

Assessing officers who levied an assessment in solido against a national bank as agent of its stockholders did not thereby discriminate against the bank merely because they failed to assess the shares of stock in the same manner in which shares of stock in other like institutions were assessed. *First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988.

A tax levied under Pub. St. Mass. c. 13, § 8, which provides that bank shares shall be assessed at their cash value, is not in violation of Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], or unconstitutional, as being "at a greater rate than other moneyed capital in the hands of citizens," because disproportionate and unequal to the tax imposed, under Pub. St. Mass. c. 13, relative to the taxation of the corporate franchise of corporations, excepting banks, on life insurance companies, based on the number of their policies, on trust and like companies, based on the amount of their deposits, and on telephone companies, based on the number of telephones used by them, these corporations not

being banking institutions, and the investments made by them, their only capital, not being "moneyed capital in the hands of citizens." *National Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

Kirby's Dig., §§ 6902, 6919-6924, requiring every bank to annually deliver to the assessor a statement of the amount of capital, undivided profits, values of moneys, credits, etc., the amount loaned to or deposited with the bank, and providing that the shares in banks taxable by law shall be listed by the officers thereof showing the names of persons owning the same, and that the taxes assessed on the shares of stock thus listed shall be paid by the bank, etc., provide for the taxation of the shares of national bank stock, and not the capital stock of the bank itself, and the requirement of a schedule setting forth the enumerated things is not merely intended as a method of arriving at the valuation of the shares, so that the statute meets the requirement of Rev. St. U. S., § 5219 (U. S. Comp. St. 1901, p. 3502), authorizing the taxation of the shares in national banks, subject to the restriction that the tax shall not be at a greater rate than is assessed on other moneyed capital, etc. *First Nat. Bank v. Board*, 92 Ark. 335, 122 S. W. 988.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], before the assessment of national bank shares can be held invalid, it must be shown that there is in fact a higher tax imposed on them than on other moneyed capital, and it is insufficient to show merely that the state laws provide a different mode of taxing moneyed capital invested in savings banks or other corporations. *Richards v. Rock Rapids*, 31 Fed. 505.

Trust companies in New York.—And so as to the system of taxing trust companies in New York, there being no evident intent disclosed to discriminate in their favor as against banks, including national banks. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, followed in *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839.

holders.¹⁹ The prohibition in the act of congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any method of assessment of taxation, the usual or probable effect of which would be to discriminate in favor of state banks and against national banks, and even where no such discrimination seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the state in its practical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of congress, and therefore void.²⁰ But if neither the necessary, usual or prob-

19. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592, reversing 120 App. Div. 838, 105 N. Y. S. 933.

The federal constitution does not confine the state to one system of taxation, but different systems adjusted with reference to the valuation of different kinds of property may be adopted, and the method of collecting it may be varied to suit the necessities of the case. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

20. **Tax laws discriminatory in operation but not terms.**—*Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, reaffirmed in *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053.

A discrimination against national banks and in favor of state banks and other moneyed corporations, forbidden by Rev. St. U. S., § 5219 [U. S. Comp. St. 1901, p. 3502], results from the taxation of shares of stock of national banks, under Pol. Code Cal., §§ 3608-3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the property of state banks and other moneyed corporations does not require, although property is defined by Const. Cal. art. 13, § 1, as including franchises, that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock. *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384.

And where the assessment of a state bank, taken by the agreed statement of facts as illustrative of the other assessments against state banks, showed

a striking undervaluation as compared with the assessments of national banks, as admitted, it can not be claimed with any force in argument that this statement shows but an isolated case of undervaluation and does not establish a general practice. *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384.

So where, although for the purposes of taxation the statutes of a state provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares are assessed at their full value, is a violation of the act of congress which prescribes the rule by which they shall be taxed by state authority. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903.

The laws of Pennsylvania removed the burden of county taxation from railroad securities, from shares of stock in any company liable to pay a certain tax into the state treasury, from mortgages, judgments, and recognizances of every kind, from moneys owing upon agreements for the sale of real estate, and from all loans made by corporations, which were taxable for state purposes, when the state tax should be paid. In an action to enjoin the levying of a county tax upon certain shares in a national bank in such state, brought on the ground that such tax was inconsistent with Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing that the taxation by state authority of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, the bill showed large amounts of property in the state of the kind mentioned above as exempt

able effect of the system of assessment discriminates against the national banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for the federal supreme court to hold the statute unconstitutional.²¹

from county taxation. Held, that a demurrer to the bill was improperly sustained. *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

Under Rev. St. Ohio, §§ 2808, 2809, establishing a state board for the equalization of returns of bank shares from the various counties for taxation, according to the rules prescribed in that title for equalizing real and personal property, and authorizing it to increase or diminish the value of the shares, according to their relative value, such board has power only to equalize the assessed value of such shares among themselves; and an order made by it increasing the assessment of shares of a national bank above that of other property in the county is invalid, under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing against discrimination against such banks in state taxation. *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121.

Inasmuch as the existing laws of Indiana (1 Gav. & H. St. p. 17), do not allow taxes for state and county purposes to be assessed upon shares in stock of state banks, in the hands of shareholders, and the act of congress of June 3, 1864 (14 Stat. 112, § 41), prohibits state taxes on shares in national banks exceeding the rate imposed upon shares in banks of the state, the owner of stock in a national bank can not be taxed, in respect of such stock, for state or county purposes. *Wright v. Stilz*, 27 Ind. 338.

The retroactive provision of Act Ky. March 21, 1900, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited, by Rev. St. U. S., § 5219 [U. S. Comp. St. 1901, p. 3502], where, until the passage of the act, national banks were not required to return for taxation shares of their capital stock held outside of the state. Decree 129 Fed. 792, affirmed. *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. Ed. 963, 25 S. Ct. 562.

By the revenue laws of Indiana of 1872 capital represented by credits, which included money at interest within or without the state, is not taxed for its full or fair value, but only on the balance which may remain after deducting the amount of the taxpayer's bona fide indebtedness, while capital represented by national bank stock is taxed according to its fair value, without allowance for debts. Held, that the law was in conflict with Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], permitting state taxation of national bank shares, "subject to two restrictions," one of which is that such taxation "shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state." *Evansville Nat. Bank v. Britton*, 8 Fed. 867, 10 Biss. 503.

Where an ordinance of a city imposes a tax on all banks, but from the payment of which the state banks have been adjudged exempt, such ordinance is invalid as an unlawful discrimination against national banks. *City Nat. Bank v. Paducah*, Fed. Cas. No. 2,743, 2 Flip. 61.

21. *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, where it was held that the mode of taxation adopted by the state of New York in reference to its corporations did not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

A rule adopted by the board of assessors of a city to assess all shares of stock in state and national banks in the city at par, without regard to their actual market value, but making the requisite reduction in real estate owned by the banks, is not in conflict with Rev. St., § 5219 [U. S. Comp.

The term "moneyed capital," as employed in § 5219 of the Revised Statutes, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital (in the hands of individual citizens of such state), does not include capital which does not come into competition with the business of national banks, and it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated.²² The limitation applies solely to

St. 1901, p. 3502], providing that the taxation of shares in national banks by the state in which they are situated shall not be at a greater rate than other moneyed values in the hands of individual citizens of such state. *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234.

The county assessors assessed the stock of all the banks in the county, both state and national, at the par value. The actual value of the shares of certain national banks was 25 per cent above par, and the actual value of all the banks in the county was above par, varying in that respect from 10 to 100 per cent. A shareholder of the national bank sought to recover the amount paid on his stock on the ground of discrimination. Held that, the discrimination not being designed by the assessors, the assessment, considering the nature of the property, secured as nearly as practicable equality and uniformity of taxation between such state and national banks. *Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 S. Ct. 1244.

In the taxation of the shares of a national bank, it must appear that the assessors acted under some agreement or rule necessarily tended to tax such shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, in order to render their assessment void under § 5219 of the Revised Statutes [U. S. Comp. St. 1901, p. 3502]. *First Nat. Bank v. Farwell*, 7 Fed. 518, 10 Biss. 270.

The taxation of national banks by valuation of the shares of stock owned therein (such shares being assessed to the stockholders at the place where the bank is located) is substantially the same as that authorized with reference to state and savings banks, which are directly taxed by valuation of the aggregate shares thereof (United States bonds being included in determining the valuation of the aggregate shares), and there is no discrimination against national banks. *National State Bank v. Burlington*, 119 Iowa 696, 94 N. W. 234.

Statutes of New York taxing trust companies.—Where it was contended that the statutes of New York, in reference to the taxation of trust companies, were essentially different from those applicable to national banks; that these trust companies were practically carrying on a banking business; that an enormous amount of moneyed capital was invested in them, and that as a result not merely theoretical but practical and burdensome discrimination was made against the moneyed capital invested in national banks, it was held that the state would take the proper steps to keep them within their statutory limits, and a neglect for a limited time to do so could not be considered as an assent by the state to such an improper assumption of power. It is not to be assumed that it has so legislated that upon the face of the state is acting in bad faith; that the statutes a uniform rate of taxation upon all moneyed capital is provided, while at the same time it has designedly placed the grants of some corporate franchises in such form as to permit the use of moneyed capital in certain ways with peculiar and less stringent rates of taxation. *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905, reaffirming *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. See, also, *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839.

22. "Moneyed capital" means competing capital.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407, and cases cited; *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594; *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863; *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629.

Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing that taxation on the shares in national banks by the state within which they are located

a parallel with the individual or corporation whose capital in money is used with a view to compensation for the use of the money.²³ Shares of stock held in insurance companies and other business, trading, manufacturing and miscellaneous corporations, whose business and operations are unlike those of banking institutions, are not moneyed capital in the sense of the statute.²⁴

shall not be at a greater rate than is assessed on other moneyed capital in the hands of individuals within the state, refers to other taxable moneyed capital; and the valuation of shares in national banks for taxation is not at a greater rate than the assessment of other moneyed capital, unless such other moneyed capital be subject or liable to taxation. *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

23. *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594.

"The significance of this expression has been defined by this court in the case of *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, cited in *Palmer v. McMahon*, 133 U. S. 660, 667, 33 L. Ed. 772, 10 S. Ct. 324, as follows: 'The term "moneyed capital," as used in Rev. Stat., § 5219, respecting state taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money.' " *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594. See, also, *People v. Commissioners* (U. S.), 4 Wall. 244, 18 L. Ed. 344.

The words "moneyed capital" do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but the shares of stock in such companies held by individuals are not moneyed capital. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

The words "other moneyed capital" as used in Rev. St., U. S., § 5219 (U. S. Comp. St. 1901, p. 3502), providing that the shares in national banks shall not be

assessed at a greater rate than other moneyed capital in the hands of individual citizens, does not mean all capital, the value of which is measured in terms of money, nor all forms of investment in which the interest of the owner is expressed in money, nor shares of stock represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire property of the corporation, nor real or personal property, such as ordinary chattels or commodities, nor investments in manufacturing and industrial enterprises; but does include shares of stock or other interest owned by individuals in enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by the use of money. *First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

The act of congress which protects national banks from injurious discriminations does not limit the standard of comparison to the "moneyed capital" invested in the "incorporated banks" of a state, but extends to all "moneyed capital in the hands of individual citizens of the state." To equalize the shares of national banks as to part only of that moneyed capital, is not to equalize them as to the whole, which is necessary to comply with the statute. *First Nat. Bank v. Treasurer*, 25 Fed. 749.

Nor is it any less an unlawful discrimination that the national bank shares are in fact assessed below "their true value in money." *First Nat. Bank v. Treasurer*, 25 Fed. 749.

24. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

It does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in

Discrimination in Mode of Assessment.—Any system of assessment of taxes which exacts from the owner of the shares of a national bank a

money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly in real and personal property which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; reaffirmed in *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079, 17 S. Ct. 996; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412; *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, where such corporate capital is said not to be necessary "moneyed capital" even though its shares are such capital in the hands of individuals, or though it invests its capital in securities payable in money.

"The terms of the act of congress, therefore, include shares of stock or other interest owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested." *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment, thus coming into competition with the national banks in the banking business. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

But money at interest is not the only moneyed capital included in that term as here used by congress. The words are "other moneyed capital." That certainly makes stock in na-

tional banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term. *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112.

Stock in mining corporations.—The fact that there are a large number of mining corporations in Montana whose entire capital stock is invested in assessable property, and whose stock is not taxed for that reason, and that part of said property consists in mining claims, does not disturb the limitation of § 5219. *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594.

Manufacturing or transportation company.—The tax upon a corporation whose capital is invested in manufacturing or transportation can not, under this section, be placed in comparison with the tax upon an institution whose business is profit on money as money. So, whatever may be the rule in Montana in respect to the taxation of mines and mining claims, or of corporations whose investments are wholly or partially in that direction, it does not challenge or disturb the rule of taxation of money as money, or of purely moneyed corporations, upon that basis. *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Credits as moneyed capital.—"It can not be contended that all credits, as defined in the statute of Ohio, are moneyed capital within the meaning of the act of congress. The term 'credits' includes among other things, as stated in the statute, 'all legal claims and demands * * * for labor or service due or to become due to the person liable to pay taxes thereon.' These claims are not in any sense of the statute moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed manual labor." *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407. See, also, *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412.

Savings banks and deposits therein.—"No one can suppose for a moment that savings banks come into any possible competition with national banks

larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of congress.²⁵ It has reference to the

of the United States." *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. See, also, *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

And while deposits in savings banks constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase, it is clear that they are not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 86, 31 L. Ed. 94, 8 S. Ct. 73; *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

Personal property not always moneyed capital.—"The act of congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way." *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053, quoted in *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Shares of foreign corporations.—Clearly the property to be taxed under the rule prescribed for the taxation of national bank shares must be property which, according to the law of the state, is the subject of taxation within its jurisdiction, and does not include shares of stock of corporations created by other states and owned by citizens of New York. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895 7 S. Ct. 826.

Shares of stock in noncompeting moneyed corporations of New York.

—The shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, but which do not come into competition with the banks, are not moneyed capital in the hands of the individual citizen within the meaning of the act of congress. The true test is in the nature of the business in which the corporation is engaged. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; reaffirmed in *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079, 17 S. Ct. 996.

Shares in insurance and trust companies.—Within the definition of that phrase, established in the case of the *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, the interest of individuals in insurance and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the state. *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772; *People v. Commissioners (U. S.)*, 4 Wall. 244, 18 L. Ed. 344.

See *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, where shares in trust companies under the laws of New York are said to be moneyed capital in hands of individuals, although in that case there was no discrimination, and *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, reaffirmed as to insurance companies in *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Such stock as that in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks. *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629.

25. Discrimination by system of assessment.—*Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *Peo-*

entire process of assessment, whether the discrimination be by the valuation or by the rate of assessment on such valuation.²⁶ Presumptively the nominal value is the true value, any increase in profits going, in the natural course of things, in dividends to the stockholders, and this method, as applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation, and can not be considered as discriminating against either.²⁷ But the valuation may be at the actual value, even if over par, if the rate of taxation is the same,²⁸ and may include the added value arising from the franchises of the bank, although no such added value obtains in the case of unincorporated banks subject to taxation.²⁹ Individual in-

ple *v. Weaver*, 100 U. S. 539, 25 L. Ed. 705.

Although for purposes of taxation the statutes of a state provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares are assessed at their full value, is a violation of the act of congress which prescribes the rule by which they shall be taxed by state authority. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing that state taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, the statute of New York, permitting a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, taxes them at a greater rate than other moneyed capital, and is void as to them. *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705.

In January, 1906, the court of appeals held that there was a discrimination against national banks in the method of assessing them and state banks, since state banks under existing laws, being assessed upon their capital and assets, so much of their capital as was invested in federal bonds was not taxable, while national banks being assessed on their shares of stock, the value of such bonds in which their capital was invested was not deducted, and the court held such deduction should be allowed. Immediately thereafter the act effective June 11, 1906 (Laws 1906, p. 134, c. 22, subd. 2), was enacted, and provides that an annual tax at the same rate as is fixed upon other per-

sonalty for state purposes shall be imposed upon the value of the shares of the banks. Held, that such act provides for an assessment of the shares of stock of national banks, and not for an assessment of their assets, which would be in express violation of The National Banking Act (Act June 3, 1864, c. 106, 13 Stat. 99 [U. S. Comp. St. 1901, p. 3454]). *Hager v. Citizens' Nat. Bank*, 127 Ky. 192, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

26. Valuation or rate of assessment.—*People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706, citing besides the above cases, *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053, and deducing the above rule therefrom. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

27. Assessment at par value.—*Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234; reaffirming *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044. See, also, *Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 S. Ct. 1244.

28. *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826. See, also, *People v. Commissioners*, 94 U. S. 415, 24 L. Ed. 164; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324.

29. Added value of banking franchises.—*First Nat. Bank v. Chapman*,

stances of omission or undervaluation are insufficient to invalidate an assessment.³⁰ The fact that irregularities in the assessment for certain years, of national bank shares, in that no entry of any assessment of the shares of the plaintiff and of the stockholders whose claims were assigned to him was made on the assessment roll of those years until after the first of September, and after the time for revising and correcting the assessment had passed, and in the defect of the oath annexed in its averment as to the estimate of the value of real estate, were cured by validating act, was not in conflict with the act of congress respecting taxation of national bank shares.³¹

Discrimination in Matter of Deduction of Indebtedness.—The taxation of national bank shares by a state statute without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness as in cases of other investments of moneyed capital is a discrimination forbidden by the act of congress.³² So where such deduction is

173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

30. Individual instances of omission or undervaluation.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, reaffirmed in *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234. See, also, *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 49 L. Ed. 669, 25 S. Ct. 384, where an agreed statement of facts that the assessment was illustrative of others, was held to prevent this rule from applying. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324.

Where to provide for a legal assessment is clearly the purpose of the laws, if, in attempting to effect that purpose some slip is made or some details are provided for therein which may render assessments under them irregular or even illegal, that fact does not detract from the equitable duty of the shareholders in national banks to fulfill the plain demands of the laws, and pay a tax on their shares in like proportion as is assessed upon other moneyed capital, before they can establish any claim for interference in their behalf by a court of equity. *People's Nat. Bank v. Marye*, 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

Pleading.—A bill which alleges no statutory discrimination against shares of national bank stock, and no such agreement or common action of assessors, and no general rule of discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valua-

tions which establish no rule on the subject, is bad on demurrer in a suit to restrain collection of tax on such shares. *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

And a bill averring that the shares of the bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of stock of the complaint, is demurrable. *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

31. Act curing irregular assessment.—*Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 S. Ct. 1244.

32. Discrimination in the matter of deduction of indebtedness.—In general.—*Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053. See, also, *People v. Weaver*, 100 U. S. 539, 546, 25 L. Ed. 705; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839.

Act N. Y. April 23, 1866, c. 761, which does not permit the holder of national bank stock to set off his indebtedness, is so far in conflict with Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502]; such set-off being permitted in all other cases. *Stanley v. Albany*,

allowed from the valuation of personal property generally and other moneyed capital, but not from the valuation of national bank shares.³³ But the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation, does not in itself constitute an illegal

121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234.

Though the New York statute of 1866 is in conflict with the act of congress in not permitting a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while the owner of other property can do so, the statute is not by reason thereof void, and the assessment provided for in it is binding upon stockholders having no debts. *Albany v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044.

Where an ordinance imposing a tax on all banks taxes other moneyed capital, but a reduction of the whole amount of the owner's indebtedness is allowed to be deducted before assessment, and no such deduction is allowed where the capital consisted of national bank shares, the tax is invalid. *City Nat. Bank v. Paducah*, Fed. Cas. No. 2,743, 2 Flip. 61.

The provision of the revenue law (Code, § 358, subd. 2), which exempts from taxation money invested in state bonds, is sanctioned by immemorial custom of good faith and public honesty, a violation of which is not to be presumed to have been intended by congress, and is not an unfriendly discrimination against capital invested in national banks; but the provisions (Code, § 362, subds. 8, 10) which authorize the taxpayer to deduct his indebtedness from the amount of "money loaned" and "solvent credits," taxing only the excess, and exempting from taxation such portion of the "capital stock of incorporated companies created under any law of the state as may be invested in property, and taxed otherwise as property," and limiting municipal taxation upon such corporations upon moneyed capital, discriminate unfavorably against shareholders in national banks, and are to that extent violative of the act of congress, and therefore, prior to the Act of December 8, 1880, providing for taxation of shares of stockholders in national banks, there was no statute in force under which a valid assess-

ment of taxes could be made upon such shares. *Pollard v. State*, 65 Ala. 628.

33. Personal property generally.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, reaffirming in *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706. See, also, *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324.

The cases of *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053, and *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, are applications of the same principles. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

While personal property is not necessarily moneyed capital, the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way. *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053.

An act of the legislature of the state of New York, passed April 23, 1866, provided in substance that a bank shareholder, who had been assessed upon the value of his shares, was not entitled to any deduction on account of his debts, although the general laws of the state provided that in the assessment of personal property a deduction should be made for the debts owing by the person so assessed. Held, that such provision of the Act of 1866, so far as it related to the shares of a national banking association, violated the restriction contained in § 5219, Rev. Stat. [U. S. Comp. St. 1901, p. 3502], which provided that the taxation of such shares should not be at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state. *National Albany Exch. Bank v. Hills*, 5 Fed. 248, 18 Blatchf. 478.

discrimination against the holders of such shares, it not appearing what proportion of these credits were "moneyed capital." It does not appear affirmatively that there was enough to be a material discrimination, these credits not being necessarily moneyed capital.³⁴ And debts incurred in the actual conduct of a business, whether incorporated or unincorporated, may be deducted, under the law providing therefor, in ascertaining the proper valuation to be put upon such business, without being a discrimination against national bank shares, although no such deduction is provided for as to them.³⁵ But there is no reason why such a statute should not remain

34. Credits.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407, following *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079, 17 S. Ct. 996, and distinguishing *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121, on the ground that the attention of the court in that case was not directed to this question, but it was assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide debts, but not the owners of such bank shares. (See pp. 219, 220, of opinion.) See, however, also, *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

Where the constitution of the state, as construed by its supreme court, distinguished between stock and credits and authorized only a deduction of debts from credits, shares of stock were not credits, and both resident and nonresident shareholders were not entitled to deduct bona fide indebtedness from the value of their shares of stock. This construction of the statute is binding on the federal supreme court. *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863, citing *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629.

The mere fact that a state statute permits some debts to be deducted from some moneyed capital for the purpose of assessment for taxation, but not from that which is invested in the shares of national banks, does not show a violation of Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], forbidding state taxation of national bank shares to be at a greater rate than is assessed upon other moneyed

capital in the hands of individual citizens, there being nothing to show that the amount of moneyed capital in the state from which debts may be deducted, as compared with the moneyed capital invested in national bank shares, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412.

The court could not take what counsel for plaintiff calls judicial notice of what is claimed to be a fact, viz; that the amount of moneyed capital in the state from which debts may be deducted, i. e., credits, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. Ed. 573, 16 S. Ct. 412. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

Under the Ohio law, as held in *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407, "the shares in national and also in state banks are what is termed stocks or investments in stocks, and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers."

35. Debts incurred in actual conduct of business.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

So held as between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks and bankers on the other. This does not give the unincorporated bank or banker the

the law as to banks or banking associations organized under the laws of the state, or as to private bankers. Nor is it void as to a shareholder in a national bank, who owes no debts, which he can deduct from the assessed value of his shares, as the denial of this right does not affect him. He pays

right to deduct his general debts disconnected from the business of banking and not incurred therein from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined and the taxes assessed thereon. This system, is as nearly as may be, equivalent in its results to that employed in the case of incorporated state bank and of national banks. Under the sections of the Revised Statutes of Ohio which relate to the taxation of these latter classes of banks (§ 2762, et seq.) the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

The state is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality, or unfriendly discrimination is inflicted upon them, but may weigh advantages and disadvantages and substitute a low flat rate of taxation, an advantage which other property does not have, in place of the deduction of debts, an advantage which other owners of personal property enjoy. *Order 105 N. Y. S. 993*, 120 App. Div. 838, reversed. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592.

Rev. St. U. S., § 5219 [*U. S. Comp. St.* 1901, p. 3502], declares that shares of national banks may be taxed by state authority, subject to the restriction that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of any individual citizens of such state. *Tax Law, Laws 1896*, p. 804, c. 908, § 21, subd. 4, authorizes the deduction of the just debts of a person or corporation assessed in determining the amount

of his assessment for taxation. *Section 24* (page 806), as amended by *Laws 1901*, p. 1349, c. 550, provides that the rate of tax on bank stock shall be 1 per cent on the value thereof, ascertained as therein provided, and that the owners of bank stock shall be entitled to no deduction from the taxable value thereof because of their personal indebtedness. Held, that § 24 did not constitute a discrimination against national bank stock, within § 5219. *Bridgeport Sav. Bank v. Feitner*, 120 App. Div. 838, 105 N. Y. S. 993, order reversed in 191 N. Y. 88, 83 N. E. 592.

Rev. St. U. S., § 5219 [*U. S. Comp. St.* 1901, p. 3502], provides that shares of national banks may be taxed by state authority, subject to the restriction that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state. *Tax Law, Laws 1896*, p. 805, c. 908, § 23, as amended by *Laws 1901*, p. 1349, c. 550, provides that the fiscal officer of every bank shall report to the assessor the amount of its authorized capital stock, number of shares, and their par value, the amount of stock paid in, amount of surplus and undivided profits, and a list of stockholders and their respective holdings. *Laws 1896*, p. 806 c. 908, § 24, as amended by *Laws 1901*, p. 1350, c. 550, provides that the rate of tax on bank stock shall be 1 per cent on the value thereof, ascertaining by adding together the amount of the capital stock, surplus, and undivided profits, and dividing the result by the number of shares outstanding, provided that the rate shall not be greater than that assessed upon other moneyed capital in the hands of individual citizens, and that the owners of the stock shall be entitled to no deduction from the taxable value thereof, because of their personal indebtedness. Held, that an assessment based upon §§ 23, 24 was not void as being a discrimination against national bank stock, as within *Rev. St. U. S.*, § 5219, because no deduction of debts was allowed, as is permitted in the case of other corporations and individuals. *Order 120 App. Div. 838*, 105 N. Y. S. 993, reversed. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592.

the same amount of tax that he would if the law gave him the right of deduction. And in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void, but the shareholder must show the assessing officer what his debts are, and take the necessary steps to secure a correction.³⁶ Unless it is clear that such steps would be unavailing, from the fixed purpose of the assessors to make no such deductions³⁷ or where the law makes no provision for such deduction.³⁸ A judgment that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection, because a deduction of the bona fide debts of the shareholders of a national bank from the valuation of the shares, was not made, as the law allowed to be done in the taxation of "credits" in the hands of individuals, and thereby an illegal discrimination was made against national banks, is not conclusive proof of the existence of discrimination as to assessments of such stock for other years.³⁹

Discrimination in Matter of Deduction of Real Estate Outside of State.—The refusal to deduct from the value of shares of stock of the bank the assessed value of real estate owned by a national bank, situated in other states than that of its domicile, where there was no proof that such a deduction was authorized by the laws of the state of domicile in valuing

36. Statute not void, but voidable as to national bank shareholders with debts to deduct.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772, 10 S. Ct. 324; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705.

37. Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052.

38. Under the decision in Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052, the bank was entitled to relief by injunction against the collection of the illegal tax on the bank shares, and the fact that they did not make a demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock before the entire process of the appraisal and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes, did not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that "the laws of Ohio make no provision for the deduction

of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured." *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121.

39. Former judgments as res adjudicata.—*Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908.

That adjudication should not prevail as an estoppel in a subsequent case as to taxes for other years, where the statute has been subsequently construed not of itself to work such discrimination. *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908. See *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

"Those were conclusions from propositions not only of law but of fact, and granting that one of the propositions of law was the construction of the Ohio statute (a wrong construction, as has since been held), a necessary element of fact was that the discrimination complained of was effected through the practical operation of the statute in the years the assessments were made." *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407.

shares of stock of other than national banking associations, did not constitute an illegal discrimination against the shareholders, as the state of its domicile is entitled to tax the full value of such shares, of which value such real estate is an element, and although taxed at its situs also.⁴⁰

Necessity for Affirmative Showing of Discrimination.—Where there is found in the record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens, and there is nothing upon the face of these statutes which shows such discrimination, therefore it would seem that there has not been made out a case for the intervention of the court. Discrimination must be affirmatively shown, as the presumption is against it.^{40a} And such illegal discrimination must at least be definitely and clearly charged, for any relief to be based thereon.⁴¹

§ 326 (2bcc) Limitation as to Place of Taxation of Shares of Nonresidents.—Section 5219 of the United States Revised Statutes, authorizing the taxation of the shares of shareholders in national banks, provides that the shares of nonresidents "shall be taxed in the city or town where the bank is located and not elsewhere."⁴²

§ 326 (2bcd) Validity of Statute Requiring Payment by Bank as Agent of Stockholders.—The statutory appointment of the bank to pay the whole tax as agent of the stockholders, is not inconsistent with the federal law pertaining to national banks.⁴³ And the bank may be required

40. **Deduction of real estate outside of state.**—*Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863.

40a. **Burden of proof and sufficiency of averment as to discrimination.**—*First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121; distinguished. See, also, *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73.

41. *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079, 17 S. Ct. 996; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

42. **Limitation as to place of taxing shares of nonresidents.**—*First Nat. Bank v. Province*, 20 Mont. 374, 51 Pac. 821. And see post, "Place of Taxation." § 328.

43. *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839; *Van Slyke v. Wisconsin*, 154 U. S. 581, 20 L. Ed. 240, 14 S. Ct. 1168; *Aberdeen Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701, following in *Bell's Gap R. Co. v. Commonwealth*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533; *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721; *First Nat. Bank v. Douglas, Fed. Cas. No. 4, 799*, 3 Dill. 330; *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15; *Sumter v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30; *Commonwealth v. First Nat. Bank (Ky.)*, 4 Bush. 98, 96 Am. Dec. 285; *Baker v. King*, 17 Wash. 622, 50 Pac. 481. And see ante, "Shares of Stockholders," § 326 (1d).

The state has the right to make the national banks its agents to collect the tax on their shares from the individual stockholders, and it is no objection to the law that the state banks

to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends,⁴⁴ or it may be made

are not required to do the same. *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

The Indiana Act March 15, 1867, authorizing the collection of a tax on shares of capital stock in national banks, and providing that the officers in such banks shall return a list of the stockholders, is not invalid on the ground that the officers of the national banks are officers of the federal government, and not subject to state authority. *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185.

Provisions of a state statute for the taxation of national bank stock, requiring the cashier of the bank to pay the taxes assessed against its stockholders, and making him and the bank liable, therefor, and for a penalty in addition in case of default, are not illegal as applied to a bank which has in its possession dividends or other funds belonging to stockholders sufficient to pay the taxes assessed against them. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

There is no statute in Alabama which requires the national banking associations to pay the state tax on the shares of such associations. Such tax can only be assessed under Code 1876, § 362, subd. 13, and can be collected only as taxes against other individuals are collected. *Sumter v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

⁴⁴ *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *National Bank v. Commonwealth (U. S.)*, 9 Wall. 353, 19 L. Ed. 701; *Central Nat. Bank v. United States*, 137 U. S. 355, 34 L. Ed. 703, 11 S. Ct. 126; *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

Act La. 1888, § 27, providing that shares in banks shall be assessed to the shareholders, but requiring the bank to pay taxes so assessed, and authorizing it to collect the same from the shareholders, imposes a tax, not upon the bank, but upon its shares, as permitted by act of congress, providing that a state may determine the manner of taxing the shares of national banks located in the state. *Whitney Nat. Bank v. Parker*, 41 Fed. 402.

P. L. N. J. 1866, p. 1078, § 16, provides that the stock of every bank established under the acts of congress shall be assessed in the township or ward wherein the bank is located, to

all stockholders thereon, and that it shall be the duty of each of the banks to retain and pay the amount of the tax assessed to each stockholder out of the dividends from time to time secured. Rev. St. U. S., § 5219, declares that national banks shall be taxed only on their real estate. Held, that P. L. 1866, p. 1078, is not in violation of Rev. St., § 5219, since the tax is imposed on shares, and not upon the bank; being assessed in form only to the bank. *Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 113, 46 Atl. 586, affirmed in 65 N. J. L. 549, 48 Atl. 582.

Act Wash. March 9, 1891, § 21, provides for the assessment and taxation of national bank stock to the bank. Section 23 renders the bank liable for the tax as agent for the shareholder, and authorizes it to pay the tax out of the shareholder's profits or charge it to his account. Held, that a tax so assessed is not a tax on the capital of the bank, forbidden by Rev. St. U. S., § 5219. *First Nat. Bank v. Chehalis*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629.

The retroactive features of Act Ky. March 21, 1900 (Acts 1900, c. 23), making it the duty of certain officers of each national bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency, subject to a deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to discriminate against the bank, contrary to Rev. St. U. S., § 5219 (U. S. Comp. St. 1901, p. 3502), although the shareholders and the number of shares may not be the same as when the liability to taxation arose, where such statute is construed by the state courts as not imposing any new liability either upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation. *Citizens' Nat. Bank v. Commonwealth*, 217 U. S. 443, 54 L. Ed. 832, 30 S. Ct. 532.

Washington Laws 1893, p. 333, §§ 21-23, provide that shares of stock in all banks shall be assessed to the owners thereof, such tax to be paid by the bank, which shall have a lien on all the rights of the shareholders in the corporate property for reimbursement. Held, that no suit for such

optional with the bank to pay a different and larger tax on the par value, or the regular rate on the actual value, both to be paid by the bank.⁴⁵

§ 326 (2bd) Deposits in National Banks.—It has been held that there is nothing in the relation of a national bank to the federal government that protects the depositors from taxation, and that no congressional authority is needed to enable the state to tax national bank deposits to the depositors.⁴⁶ Statutes exist in some states providing for the payment of a tax by every person having a deposit in a national bank of a certain per cent upon the amount of the deposit, and provide for a forfeiture of a certain amount of such deposit to the use of the state in case of willful failure to pay such tax.^{46a} It is sometimes provided, however, that if a national

tax can be maintained against the receiver of an insolvent national bank, where the property represented by the shares has disappeared, since the receiver could not in such case be reimbursed, and the tax would fall on the assets of the bank, which belong to the creditors, thereby indirectly violating the rule forbidding a state to tax the capital stock of a national bank. *Baker v. King*, 17 Wash. 622, 50 Pac. 481.

45. *Merchants', etc., Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236, 17 S. Ct. 829.

List of stockholders required of cashier.—And the cashier of each national bank within the state may be required to transmit, by a certain date, to the clerks of the several towns in the state in which any stock or shareholders of such bank shall reside, a true list of the names of such stock or shareholders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181.

46. **Taxation of national bank deposits to depositors.**—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Since the failure to tax property borrowed against the borrower is no objection to a taxation of the credit to the lender, the fact that a borrowing bank can be protected from taxation on deposits by the doctrine of federal supremacy does not impair the right of the state to tax depositors. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

P. S. 804-820, imposing a tax on certain interest-bearing national bank deposits, is not invalid as an unlawful interference with the business of national banks because of the publicity required to be given to the business of the depositor and the bank by the returns required on which the tax is to be as-

sessed. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Since P. S. 804-820, taxing interest-bearing deposits in national banks, does not tax a deposit as the term may be used to indicate the money deposited, but rather taxes the credit the depositor receives therefor, which is also included in the term "deposit," the tax is not objectionable as a tax on the property or business of the bank. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

46a. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

P. S. 804-820, provides for the taxation of certain interest-bearing national bank deposits requiring the depositor to make a return of his average deposit within the class taxed for the preceding six months on which a tax of 7-20 of 1 per cent is levied. The statute authorizes in lieu of returns by depositors the stipulation by the bank to itself make a return of the average deposits of the class taxed and pay the tax on such sum with the right to deduct, not a proportionate amount of the tax so paid, but the actual 7-20 of 1 per cent on the average amount of the taxpayer's deposit, as a credit against the account. Held, that where a bank voluntarily elected to pay the tax itself and charge the same to its depositors knowing that, by reason of withdrawals and deposits made after the date on which the assessments were required, it would not be able to entirely recoup itself for the tax so paid, it was not entitled to object to the tax on the ground that because of its inability to so recoup itself the tax was in effect a tax on the business of the bank which the state had no authority to levy. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Limitations to deposits of residents of state.—Since the state has no ju-

bank so elects it may pay to the state taxes on deposits, and that it shall be lawful for such bank to deduct the taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom the tax is due.⁴⁷

§ 326 (2be) Taxation on Circulation.—See ante, "Taxation on Circulation," § 326 (1i).

§ 327. Exemptions—§ 327 (1) In General.—The people of a state may confer upon their legislature the power to exempt banks and other corporations from taxation either wholly or partially, and either by general legislation or by contracts embodied in charters. Whether, therefore, a state legislature has the power to exempt an individual or corporation from taxation depends upon the powers which have been vested in or withheld from such legislature by the state constitution. There is nothing in the constitution of the United States forbidding the state legislature from making such exemption.⁴⁸ Such exemption will not be a violation of the requirements of the constitution as to equality and uniformity of taxation.⁴⁹ Nor does such

jurisdiction to tax local interest-bearing deposits in national banks where such deposits are the property of nonresidents, the words "every person," as used in P. S. 809, providing for the taxation of interest-bearing deposits in national banks, and declaring that every person having such a deposit shall semiannually, except as otherwise provided, pay a tax to the state assessed at the rate of 7-20 of 1 per cent semiannually on the amount of such deposit, etc., should be construed to mean "every resident of this state" having such a deposit, and as so construed the statute is valid. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

47. Payment by bank on behalf of depositor.—*State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

A national bank has implied power to stipulate with the state to voluntarily pay a tax imposed on a specified class of the bank's interest-bearing deposits by P. S. 804-820, for the purpose of relieving depositors of the obligations of returning their deposits for taxation, and themselves paying the tax as provided by the act, as a matter of business expediency, though by so doing the bank may be required to pay a part of the tax which by reason of withdrawals, etc., it might not be able to charge against the accounts of depositors. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Vt. P. S. 804-820, imposing a tax on certain interest-bearing national bank deposits to be paid by the depositor,

or in lieu thereof by the bank on its express stipulation, does not require, in case of a stipulation by the bank to pay the tax, that it shall be apportioned among the individual depositors, but that the appropriate amount of the tax shall be charged against their deposits, and is not therefore objectionable as authorizing the taking of the property of one person to apply on or pay the tax of another. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

48. Power to exempt banks.—*State Bank v. Knopp* (U. S.), 16 How. 369, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Deholt* (U. S.), 16 How. 416, 14 L. Ed. 997, citing *Providence Bank v. Billings* (U. S.), 4 Pet. 514, 7 L. Ed. 939.

Any act declaring the capital of a bank exempt from taxation, where the bank was organized since the adoption of the constitution of 1868, is unconstitutional; being a violation of art. 118. *New Orleans v. Bank*, 27 La. Ann. 376.

49. Exemption not a violation of constitutional requirement of equality of taxation.—The exemption of banks, organized under the Louisiana Law of 1853, from taxation in the form of a license, does not violate the constitutional requirement of equality and uniformity of taxation. *New Orleans v. Peoples' Bank*, 32 La. Ann. 82.

Under the Louisiana Const. 1852, art. 123, the legislature may exempt any property from taxation altogether. All property, says the article, on which taxes may be levied, shall be taxed in proportion to its value. The legisla-

exemption violate the provisions of the National Banking Act. Such act was not intended to curtail the power of the states on the subject of taxation, or prohibit the exemption of particular kinds of property, but to protect the corporations formed under its authority from unfriendly discrimination by the states in the exercise of their taxing power.⁵⁰ And where the amount of the exemption is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation, not large enough to make a material difference in the rate assessed upon national bank shares, it will not be obnoxious to the prohibition of discrimination against national bank shares in state taxation. Exact equality is unnecessary.⁵¹ But these exemptions should be founded upon just reason, and

ture, then, may abstain from levying any taxes at all on any species of property. But if it taxes at all, it must tax equally. *New Orleans v. Commercial Bank*, 10 La. Ann. 735.

50. Exemption not forbidden.—*Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369, citing, *People v. Commissioners (U. S.)*, 4 Wall. 244, 18 L. Ed. 344; *Hepburn v. School Directors (U. S.)*, 23 Wall. 480, 23 L. Ed. 112; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706; *Talbott v. Silver Bow*, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594, where an exemption of the stock of corporations whose entire capital was invested in assessable property in the territory, was held not an illegal discrimination under § 5219. See ante, "Prohibition of Discrimination between National Bank Shares and Other Moneyed Capital," § 326 (2bcb).

Exemptions of the shares of capital stock held by individuals in all private corporations of the state, "except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this state are expressly exempted from taxation, and except mutual life insurance companies specially taxed," and of the deposits in savings banks, create no illegal discrimination. *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839.

Exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by § 5219, Rev. Stat. of the United States. *Aberdeen Bank v.*

Chehalis, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 669, 19 S. Ct. 407; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772.

State or municipal securities.—Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by congress for the taxation of national bank shares. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; See, also, *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

51. Substantial equality.—*Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839; *Davenport Nat. Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94, 8 S. Ct. 73; *Bank v. Boston*, 125 U. S. 60, 31 L. Ed. 689, 8 S. Ct. 772. See, also, *Lionberger v. Rouse (U. S.)*, 9 Wall. 468, 19 L. Ed. 721; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

In *Hepburn v. School Directors (U. S.)*, 23 Wall. 480, 23 L. Ed. 112, it was decided that the exemption from taxation by the statute of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" did not make the shares in national banks unequal and invalid. This was decided in the negative on the two grounds, 1st, that the exemption was founded upon the just reason of preventing a double

not operate as an unfriendly discrimination against investments in national bank shares. Substantial equality must be preserved, and it is sometimes difficult to determine when this rule is infringed.⁵² And the exemptions in favor of other moneyed capital may be of such a substantial character in amount as to take the case out of the operation of the rule that it is not absolute equality that is contemplated by the act of congress; but as substantial equality is attainable, and is required by the supreme law of the land, in respect of state taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere.⁵³ In many, if not all of the states, the legislatures have seen fit to exempt certain banks or classes of banks from taxation, either wholly or in part,⁵⁴ or to provide for their exemption in certain matters, as, for instance, with regard to their real estate,⁵⁵ or so much as may be employed in the bank's business;⁵⁶ or

burden by the taxation both of property and of the debts secured upon it; and, 2nd, because it was partial only, not operating as a discrimination against investments in national bank shares. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

52. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

53. Exemptions creating substantial inequality.—*Boyer v. Boyer*, 113 U. S. 689, 701, 28 L. Ed. 1089, 5 S. Ct. 706, distinguishing *Hepburn v. School Directors* (U. S.), 23 Wall. 480, 23 L. Ed. 112. See, also, *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Where a state exempts from county taxation, all bonds or certificates of loan issued by railroad company incorporated by the state; shares of stock in the hands of stockholders of any institution or company of the state which, in its corporate capacity is liable to pay a tax into the state treasury under the act of 1859; mortgages, judgments, and recognizances of every kind; moneys due or owing upon articles of agreement for the sale of real estate; and all loans however made by corporations which are taxable for state purposes when such corporations pay into the state treasury the required tax on such indebtedness, which were admitted by the pleadings to be of any substantial amount, it constitutes an illegal discrimination in favor of other moneyed capital invested in national bank shares such as is not consistent with the legislation of congress

on the subject. *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089, 5 S. Ct. 706.

54. Exemption from all taxation.—The Bank of Cape Fear is by its charter exempted from all taxes, whether town, county, or state. *Bank v. Edwards*, 27 N. C. 516; *Bank v. Deming*, 29 N. C. 55.

Under the charter of the state bank, exempting it from "all" taxes, real property of the bank within the corporate limits of the city of Charleston could not be taxed or assessed by the city council for the purpose of maintaining the police and other city institutions, in the benefit of which the bank participates. *State Bank v. Charleston* (S. C.), 3 Rich. L. 342.

Exemption of a bank by its corporate name from all taxes exempted real property owned by it. *State Bank v. Charleston* (S. C.), 3 Rich. L. 342.

55. Exemption of realty.—Real property, purchased by the State Bank for the purpose of securing a debt, and not for speculation, is exempt from taxation by the Act of January, 1845, whether the title be legal or equitable. *Dyer v. Branch Bank*, 14 Ala. 622.

56. Realty used for banking purposes.—*De Soto Bank v. Memphis*, 65 Tenn. (6 Baxt.) 415, 32 Am. Rep. 530.

Where the charter of a bank empowered it to "hold a lot of ground for the use of the institution as a place of business," exempting the same from general taxation, the exemption did not extend to such portions of a building erected thereon as were not necessary for the use of the bank's business. *De Soto Bank v. Memphis*, 65 Tenn. (6 Baxt.) 415, 32 Am. Rep. 530.

Taxation of portion of realty not so used.—The charter of a bank provided

their capital or capital stock,⁵⁷ or the property in which the same may be

that it should "pay to the state an annual tax of one-half of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes;" and also provided that the bank might "purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell or exchange the same, and may hold such real and personal property and estate as may be conveyed to it to secure debts due to it, and may sell and convey the same." The bank bought a lot and building for a place of business, but used only one floor for the purpose, renting the rest. Held, that that part of the building rented and the three lots were subject to taxation. *Bank v. McGowan*, 74 Tenn. (6 Lea) 703, affirmed in *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810.

A bank by its charter was authorized to "purchase and hold a lot of ground" for its use "as a place of business," and required to pay an annual tax on each share of capital stock "in lieu of all other taxes." It purchased a three-story brick building, only the first floor of which it used, letting the other part. Held, that only that part of the building required for the actual wants of the bank in its business was exempt from taxation. *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810.

If a bank has, in violation of its charter, erected a building not needed for banking purposes, the building is not for that reason liable to taxation as the property of the bank, when it otherwise would not be. *New Haven v. City Bank*, 31 Conn. 106.

57. Exemption of capital or capital stock.—*Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022; *State v. Board*, 48 La. Ann. 35, 18 So. 753; *In re New Orleans Improvement, etc., Co.*, 4 La. Ann. 47.

Property subjected by a bank to its ownership under a mortgage to secure stock subscriptions is not part of its capital, which is exempt from taxation under its charter. *State v. Board*, 48 La. Ann. 35, 18 So. 753.

Act April 1, 1833, incorporating the Commercial Bank of New Orleans, which exempts its capital from a tax, does not exempt shares or real property held by the bank. *Second Municipality v. Commercial Bank (La.)*, 5 Rob. 151.

The exemption of the shares of stock in the Citizens' Bank of Louisiana is carried into the extended period of

the bank's charter. *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718.

At a time when the constitution of 1834 was in force, an insurance and trust company was incorporated; a provision in its charter declaring that it should "pay to the state an annual tax of one-half of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." The name of the company was afterwards changed, and authority conferred on it to do a banking, instead of an insurance, business; all the "present rights, privileges, and immunities, excepting only that of insurance," appertaining to the old company, being transferred to the new. Held, that an increase of capital stock beyond the amount originally had was exempt in like manner as the original amount. *State v. Butler*, 81 Tenn. (13 Lea) 400.

Taxation as exempting shareholders.—The payment by a bank to the state treasurer of a tax prescribed by law on the par value of the capital stock exempts the shareholders from all other taxation. *Peiper v. Lancaster (Pa.)*, 10 Lanc. Bar, 131.

When the legislature in 1836 exempted the capital of the Citizens' Bank of Louisiana from taxation, it meant to include in the exemption that which represents the capital—the shares in the hands of those who had subscribed to the capital stock. *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718.

A state bank's charter provided that the bank should pay to the state an annual tax of one-half of 1 per cent on each share of the capital stock, which should be in lieu of all other taxes. Held, that this tax was not on the capital stock, but on the shares of stock, which were not subject to further taxation. *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 546, following *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, and reversing *State v. Bank*, 95 Tenn. (11 Pickle) 221, 31 S. W. 993.

The charter granted in 1856 by the state of Tennessee to the Bank of Commerce, which provides that the bank "shall have a lien on the stock for debts due it by the stockholders, * * * and shall pay to the state an annual tax of one-half of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes," exempts from taxation the property of the bank as well as the individual property of the shareholders in the corporate stock

invested.⁵⁸ Savings banks are very frequently favored by the state in the matter of exemptions from taxation, either in whole or in part, on their deposits,⁵⁹ or investments.⁶⁰ Under an act authorizing the taxation of

and its shares. *Tennessee v. Bank*, 53 Fed. 735.

Such construction of the charter is not affected by the fact that decisions of the supreme court of the state, holding the charter tax to be a tax on the corporate property, and only an exemption of the corporation itself, were overruled by the United States supreme court, which decided that the charter tax was a tax on the shareholder only, and an exemption, therefore, of the shareholder, since such decision does not exclude from the exemption the corporation and its property. *Tennessee v. Bank*, 53 Fed. 735.

A provision in a bank charter that it shall pay to the state an annual tax of one-half of 1 per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes, exempts the shares, but not the corporation and its property, from further taxation. *Shelby v. Union*, etc., Bank, 161 U. S. 149, 40 L. Ed. 650, 16 S. Ct. 558.

Under Acts 1821, c. 131, §§ 7, 11, taxing certain banks 20 cents on every \$100 of capital stock actually paid in, and exempting them from "any further tax or burden," such banks are exempt from further tax or charge for their franchises, but not from tax on property belonging to such banks; nor does such statute exempt shares of stock held by individuals. In *re Tax Cases* (Md.), 12 Gill & J. 117.

58. Exemption of shares as exempting surplus and undivided profits.—An exemption of the shares of stock in a bank from general taxation upon the payment of an annual tax of a certain per cent does not exempt the surplus and undivided profits. *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, 16 S. Ct. 456.

Exemption of stock and real estate.—Where the charter of a bank exempted its stock and real estate from any taxes laid by the state, parish, or any body politic or corporate, a tax imposed by municipality No. 1 on the real estate of the bank was illegal. *Municipality No. 1 v. Louisiana State Bank*, 5 La. Ann. 394.

The capital of a bank embraces all its property, real and personal; and so, where the capital stock is exempted from taxation by its charter, its bank-

ing house is equally exempt with every other part of its capital. *New Haven v. City Bank*, 31 Conn. 106.

The banking house of a bank is a part of its capital represented by its shares of stock, and a tax upon the par value of its share is a tax upon it. Therefore, under a law exempting the capital of a bank from taxation on a certain condition, the banking house is exempt, if the condition is fulfilled. *Lackawanna v. First Nat. Bank*, 94 Pa. 221.

59. Exemption of deposits in savings banks.—*Laws N. Y. 1896, c. 908, § 4, subd. 14*, exempting from taxation "the deposits in any bank for savings which are due depositors," applies to the taxation of such deposits as the property of the depositors, since a deposit creates the relation of debtor and creditor, debt is personal property, and § 21, subd. 4, provides that in assessing "personal property" the full value thereof owned by each person shall be assessed, "after deducting the just debts owing by him," so that the latter section furnishes complete exemption to the bank, and hence the former provision must be construed to exempt the depositor, in order to give it any meaning. *Heermance v. Dederick*, 35 App. Div. 29, 54 N. Y. S. 519, order affirmed in 158 N. Y. 414, 53 N. E. 163.

Under *Rev. St., § 3408*, providing that "deposits in * * * savings banks * * * shall be exempt from the tax on so much thereof as they have invested in securities of the United States, * * * and on all deposits not exceeding \$2,000 made in the name of any one person," held, that the exemption extended to \$2,000 of all deposits, and did not apply solely to such deposits as amounted to \$2,000 or under. *German Sav. Bank v. Archbold*, 104 U. S. 708, 26 L. Ed. 901.

N. Y. Laws 1857, c. 456, § 4, which provides that deposits in any bank for savings which are due to depositors

60. Exemptions of investments of savings banks.—See ante, "Loans, Investments, and Securities," § 326 (1g).

A building association is not a savings institution, within the meaning of Act June 7, 1879, § 4, exempting from a tax thereby imposed banks and savings institutions. *Bourguignon Bldg. Ass'n v. Commonwealth*, 98 Pa. 54.

stocks of a corporation in the hands of stockholders, and exempting from taxation so much of the property of the corporation as is represented by stock taxed in the hands of stockholders, the real estate of a bank is exempt from taxation, as it belongs to the stockholders, and is represented by the stock in their hands.⁶¹ In many jurisdictions, banks are exempted from general taxation upon the payment of an annual tax of a certain per cent,⁶² or the

shall not be liable for taxation other than the real estate and stocks which may be owned by such bank or company, was intended to exempt savings banks from taxation only to the extent of deposits due depositors, leaving the surplus held by such banks still liable to taxation. *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022. See ante, "Dividends, Surplus, and Undivided Profits," § 326 (1e).

61. Exemption of real estate as represented by stock in hands of stockholders.—*Belvidere Bank v. Tunis*, 23 N. J. L. 546.

62. Assessment of certain per cent in lieu of all other taxation.—*State Bank v. People* (Ill.), 4 Scam. 303; *State Bank v. Madison*, 3 Ind. 43; *Farmers' Bank v. Commonwealth* (Ky.), 6 Bush. 127; *Lackawanna v. First Nat. Bank*, 94 Pa. 221; *Memphis v. Union, etc.*, Bank, 91 Tenn. (7 Pickle) 546, 19 S. W. 758.

Where the charter of a bank exempts its property from all taxation, in consideration of the annual payment of a certain percentage on its capital, property of the bank can not be taxed either by the state or the county. *Farmers' Bank v. Commonwealth* (Ky.), 6 Bush. 127.

A provision in a bank charter, declaring that the payment of an annual tax of 1½ per cent on each share of stock subscribed shall be in lieu of all other taxes, must be construed as a protection from any license or privilege tax. *Memphis v. Union, etc.*, Bank, 91 Tenn. (7 Pickle) 546, 19 S. W. 758.

Since the charter of the State Bank of Illinois requires the bank to pay a certain per cent on the amount of its capital stock in lieu of all taxes, the lands and other property of the bank are exempt from taxation. *State Bank v. People* (Ill.), 4 Scam. 303.

Where an annual tax on a bank's capital by its charter is to be deducted from its dividends "in lieu of all other taxes and assessments on the stock in said bank," no tax can be imposed upon the capital or any part of it, by a city corporation, even upon property

situated within its limits. *State Bank v. Madison*, 3 Ind. 43.

Act March 31, 1870, providing that state and national banks, upon the payment of a tax of 1 per cent upon all their capital stock at its par value, shall be exempt from all other taxation upon their shares, capital, and profits, is not a law exempting property from taxation, within Const., art. 9, § 2, forbidding laws exempting from taxation property other than therein enumerated. *Lackawanna v. First Nat. Bank*, 94 Pa. 221.

Act Pa. June 7, 1879, § 17, provided that, where banks elected to pay a certain tax on the value of the shares, the shares, capital, and profits of the bank should be exempt from other taxation. By Act Jan. 10, 1881, such section was re-enacted, with the exception that the exemption from taxation was confined to so much of the capital and profits of the bank as were not invested in real estate. The whole section was not re-enacted, and there were some immaterial verbal alterations in the part which was set out. Held, that the fact that at the time of the passage of the act of 1881 the only national bank property taxable for local purposes was real estate did not render the act void for repugnancy. *National Bank v. Chester*, 14 Fed. 239.

Act June 30, 1885 (P. L. 193), provided that any bank or savings institution which elected to pay into the state treasury a tax of six mills on the dollar on the par value of all the shares of stock of said bank that have been subscribed for or issued shall be exempt from "all other taxation under the laws of this commonwealth." Held, that Act June 1, 1889 (P. L. 420), § 25, which amends Act June 30, 1885, and provides that when such institution makes such election the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be exempt from "local taxation" under the laws of this commonwealth, does not exempt the bank from state taxation. *Wilkes-Barre, etc.*, Sav. Bank v. *Wilkes-Barre*, 148 Pa. 601, 24 Atl. 111.

Gen. St. of Ky. c. 92, art. 2, § 1, providing that state and national banks,

performance of certain other conditions.⁶³ Where a bank has not paid taxes as provided by a statute imposing a tax measured by the entire assets, in lieu of all other taxes, the taxation of such bank is governed by the statute providing that the capital paid in of banks shall be taxed at its market value, since it remained operative in case the later act was not complied with.⁶⁴ It has been held in some states that where a bank is a public corporation, chartered for the benefit of the state, exemption of the property of such bank from taxation is necessarily implied, though not provided for in the charter.⁶⁵

and "other institutions of loan and discount," shall be taxed in a certain manner, in full of all state, county, and municipal taxes, refers only to incorporated institutions. *Commonwealth v. Fleming, County Farmers' Bank*, 19 Ky. L. Rep. 266, 39 S. W. 1041.

Gen. St. c. 92, art. 2, which provides for a tax on "shares of stock in state and national banks and other institutions of loan and discount," and provides that this tax shall be paid into the treasury, and shall be paid in full of all tax, state, county, and municipal, does not apply to private or unincorporated banks, private banks being left to pay as others under the general provisions of the revenue law. And, therefore, the payment into the state treasury by a firm of private bankers of a tax of 75 cents on each \$100 of their capital stock does not exempt them from city or county taxation. *Bowling Green v. Barclay, etc., Co.*, 12 Ky. L. Rep. 190, 228.

The original act incorporating a bank directed that counties should pay to the state semiannually a certain per cent of the stock actually paid in during the continuance of the charter. Before the bank was organized, such section was repealed by a supplement directing that in lieu of other taxes the bank should pay a tax semiannually at a certain rate for the whole of the capital stock actually paid in during the continuance of the charter. By another act a certain tax was imposed on 75 per cent of the surplus or continuous fund of the banks of the state generally. Held, that the words, "in lieu of other taxes," do not warrant the inference that the state thereby agree not to impose any tax thereafter on any other property of the bank. *State v. Bank (Del.)*, 2 Houst. 99, 73 Am. Dec. 699.

Under Act July 15, 1897 (P. L. 292), § 1, exempting a bank or savings institution paying a four-mill tax upon the actual value of all the shares of its stock from local taxation, and pro-

viding that it shall not be required to make any report to the local assessor, or county commissioners of its personal property for the purpose of taxation, and shall not be required to pay any tax thereon, a bank or savings institution is exempt not only from local taxation, but is not required to pay any tax on personal property owned by it. *Commonwealth v. Clairton Steel Co.*, 222 Pa. 293, 71 Atl. 99.

Where a bank has not paid taxes as provided by Act March 8, 1888, amending Code 1880, § 585, imposing a tax, measured by the entire assets, in lieu of all other taxes, it is not entitled to the benefits of such act. *Bank v. Oxford*, 70 Miss. 504, 12 So. 203.

63. The legislature of Maryland by statute in 1821 extended the charters of several banks to 1845, upon condition that they would make a road and pay a school tax, and further provided that, upon any of the aforesaid banks accepting and complying with the terms and conditions of the act, the faith of the state was "pledged not to impose any further tax or burden upon them during the continuance of their charters under" that act. Held, that the former clause exempted only the franchise from taxation, but that by the latter clause the stockholders were exempted from taxation as individuals according to the amount of their stock. *Gordon v. Appeal Tax Court (U. S.)*, 3 How. 133, 11 L. Ed. 529.

64. Method of taxation where bank has not paid tax in lieu of all other taxes.—*Bank v. Oxford*, 70 Miss. 504, 12 So. 203.

65. Implied exemption.—As the Bank of Tennessee is a public corporation, chartered for the benefit of the state, and none of its stock is private, though in its charter there is no express provision exempting the property of the bank from taxation, yet such exemption is necessarily implied. *Nashville v. Bank*, 31 Tenn. (1 Swan) 269.

§ 327 (2) Irrevocability of Statutes Providing for Mode of Taxation and Exemptions.—An act incorporating certain banks and providing for a specific mode of taxing banks organized under such act, creates a contract between the state and such banks, limiting the state's power of taxing them to the mode prescribed in said act,⁶⁶ and this contract, it has been held, can no more be impaired by a subsequent constitution of the state imposing a tax, than by statutory enactment.⁶⁷ A provision that a bank shall pay a certain portion of its dividends to the state, in lieu of all taxes, is a

66. Irrevocability of statutes providing for mode of taxation and exemptions.—*Commercial Bank v. Bowman*, 1 Handy 246, 12 O. Dec. 125.

Act Feb. 24, 1845, entitled "An act to incorporate the State Bank of Ohio and other banking companies," and providing (§ 60) for a specific mode of taxing banks organized under that act, created a contract between the state and each of such companies, limiting the state's power of taxing such banks to the mode prescribed in said act. *Commercial Bank v. Bowman*, 1 Handy, 246, 12 O. Dec. 125.

Where a bank has paid to the state a certain sum in consideration of receiving a charter relieving it from all future taxation, a city council can not thereafter levy a tax on dividends received by stockholders in such banks. *State v. Charleston* (S. C.), 5 Rich. L. 561.

The provision of the charter of the Georgia Railroad & Banking Company that its stock shall be subject to a tax not exceeding one-half per cent per annum on its net earnings imposes a limit to all taxation to which the company may be subjected on account of the capital invested in the enterprise contemplated by the charter or its franchise to carry on such enterprise, and, in view of the contract created by such charter provision, the state can not impose a tax on the company's franchise under the Franchise Tax Act of December 17, 1902 (Laws 1902, p. 37). *Georgia R., etc., Co. v. Wright*, 132 Fed. 912.

A charter of a bank, exempting its stock and real estate from any taxation, constitutes a contract with the state, and was not repealed by Const., art. 127, requiring uniform taxation. *Municipality No. 1 v. Louisiana State Bank*, 5 La. Ann. 394.

A provision in a bank charter declaring that the payment of an annual tax of 1½ per cent on each share of stock subscribed shall be in lieu of all other taxes is a protection from any further taxation, not only of the shares

held by the stockholders but of the capital stock. *Memphis v. Union, etc., Bank*, 91 Tenn. (7 Pickle) 546, 19 S. W. 758.

The Farmers' Bank of Kentucky is not liable to be taxed for city purposes on real estate purchased by it at execution sale in satisfaction of a judgment held by it. It can not be subjected to any tax whatever except that provided by its charter. *Farmers' Bank v. Newport*, 10 Ky. L. Rep. 819.

Extended charter subject to appeal.—The charter of a Kentucky bank, granted in 1833, contained a provision as to the mode of taxation of the bank, and fixed a limit beyond which it should at no time be taxed. The charter was renewed from time to time thereafter, the last time being in 1880. In 1856 the legislature passed an act (Gen. St. Ky. c. 68, § 8) providing that all charters thereafter granted should be subject to an amendment or repeal at the will of the legislature, unless a contrary intent was plainly expressed therein. Held that, conceding that the extension of 1880 carried with it into the new period the limitation of the old charter of the bank as to taxation, still the charter as thus extended was subject to repeal under the statute of 1856, there being no contrary provision in the act of extension, and, as the power to repeal it as a whole included the power to repeal any provision in it, such limitation did not constitute an irrevocable contract, preventing the state from increasing the rate, or changing the mode, of taxation. *Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039, 19 S. Ct. 753.

67. Can not be impaired by state constitution.—*Dodge v. Woolsey* (U. S.), 18 How. 331, 15 L. Ed. 401. The case of *State Bank v. Knoop* (U. S.), 16 How. 369, 14 L. Ed. 977, again affirmed, citing *Mechanics', etc., Bank v. Debolt* (U. S.), 18 How. 380, 15 L. Ed. 458; *Mechanics', etc., Bank v. Thomas* (U. S.), 18 How. 384, 15 L. Ed. 460; *Jefferson Branch Bank v. Skelley* (U. S.), 1 Black 436, 17 L. Ed. 173.

clear contract that neither its property nor its valuable franchise shall be taxed at any time thereafter.⁶⁸

§ 327 (3) Exemption Granted by Charter Personal and Not Transferable by Sale of Charter.—Immunity from taxation granted a banking corporation by its charter is personal, and can not be transferred by a sale of the charter without the consent of the state.⁶⁹ The granting to a corporation, in the act chartering it, of all “powers, rights, reservations, restrictions, and liabilities,” of another corporation, does not confer upon it immunity from taxation, which the latter enjoyed by the provision in the charter for a special tax.⁷⁰

§ 327 (4) Waiver of or Estoppel to Claim Exemptions.—A bank may waive its right to exemption from taxation, either expressly,⁷¹ or by implication, as where a bank winds up its affairs as a state corporation, and organizes as a national bank under the national banking law.⁷² Though the

68. *Jefferson Branch Bank v. Skelley* (U. S.), 1 Black 436, 17 L. Ed. 173.

Section 60 of the charter of the State Bank of Ohio is a contract by the state to accept the sum therein specified in lieu of all taxes. *Jefferson Branch Bank v. Skelley* (U. S.), 1 Black 436, 17 L. Ed. 173; *Franklin Branch Bank v. Ohio* (U. S.), 1 Black 474, 17 L. Ed. 180.

Under State Bank Charter, § 15, providing that there shall be deducted from the dividends and retained in the bank each year the sum of 12½ on each share of stock other than that held by the state which shall constitute a part of the permanent fund being devoted to common school education, and such tax shall be in lieu of all other taxes and assessments on the stock of the bank, and, further, that in case an ad valorem system of taxation be adopted the stock shall be subject to the same ratio of taxation as other capital, not exceeding 1 per centum, including the aforesaid tax, the sum reserved for education and the ad valorem tax can not together exceed 1 per cent on such portion of the stock as has been paid in, and on account of which the stockholders are not indebted to the state. *State v. State Bank (Ind.)*, 7 Blackf. 393.

69. *Immunity from taxation personal and not transferred by sale of charter.*—*State v. Mercantile Bank*, 95 Tenn. (11 Pickle) 212, 31 S. W. 389.

A corporation may exist under and by virtue of the purchase at a receiver's sale of the charter of another corporation, and the legislative recognition and the assumption of the state that it

is a corporation, and yet not have any right to an exemption from taxation granted the other corporation, because it is not, in law or in fact, the same. *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. Ed. 656, 16 S. Ct. 461.

70. *State v. Mercantile Bank*, 95 Tenn. (11 Pickle) 212, 31 S. W. 989.

71. *Express waiver by consent to act prescribing new tax.*—Gen. St. c. 92, art. 2 (Hewitt Bill of 1886), relating solely to taxation of banks, and repealing all acts, general and special, and parts of acts inconsistent therewith (§ 1), fixed a certain tax on stock and surplus, and (§ 2) exempted from further taxation those banks which should, at any time before the next legislative session, consent to the tax prescribed, and waive and release all right under acts of congress or state charters to a different mode or a smaller rate of taxation. Section 6, incorporated into the act chapter 68, § 8 (Act Feb. 14, 1886), which declares that all subsequent charters of and grants to corporations, and amendments thereof, and all other statutes, are subject to amendment or repeal, unless a contrary intent be thereby plainly expressed. Held, that the acceptance of Act 1886 by state banks chartered prior to 1886 was a surrender of any immunity from increased taxation which their charters gave them, and a consent to the repeal of so much of their charters as was inconsistent with said act. *Deposit Bank v. Daviess*, 102 Ky. 174, 19 Ky. L. Rep. 248, 39 S. W. 1030, 44 L. R. A. 825.

72. *Waiver by organization under national banking law.*—By the banking

Act Tenn. March 26, 1887, authorizes any company having power to receive moneys in trust to do a general banking business without forfeiting any right, privilege, or immunity granted in the original charter, an insurance company incorporated before 1870 which was authorized by charter to receive moneys in trust, loses, upon undertaking to do a banking business, an immunity from general taxation given by its charter, since it then, in effect, becomes a new company, and is, as such, subject to Const. 1870, art. 2, § 28, requiring all property to be taxed.⁷³ The fact that the assessors, in valuing shares of national bank stock which were assessed to the owner thereof, erroneously omitted a part of the capital stock which was used to purchase real estate, did not preclude the bank from asserting the exemption of the real estate from taxation as against it.⁷⁴

§ 327 (5) Acquisition of Exempt Property to Evade Taxation.

—Where the facts tend to show that a purchase of United States bonds by a bank was for the purpose of evading taxation—the bonds being purchased immediately before and sold immediately after the date as of which its property was listed for taxation, and never being taken into its possession, but left on special deposit in a distant bank—the transaction may be regarded as fraudulent, and the bank be assessed with the amount of money invested in such bonds.⁷⁵

§ 328. Place of Taxation—§ 328 (1) Banks and Bank Property and Stocks in General.—The real estate of a bank, including its banking house, is liable to taxation in the place where such estate lies.⁷⁶ Under a

law of 1857, it was provided that banks organized thereunder should pay to the state annually 1 per cent on the capital stock in lieu of all other taxes to be paid to the state. Subsequently, by the Act of 1863, banks so organized were given the privilege of winding up their affairs as state corporations, and organizing as new bodies under the national banking law. Held, that as to the banks organizing as national banks under the law of 1863, the contract between them and the state as to taxes existing by virtue of the laws of 1857 was dissolved. *Lionberger v. Rowse*, 43 Mo. 67.

73. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. Ed. 664, 16 S. Ct. 468, affirming 19 S. W. 1045.

74. *First Nat. Bank v. Douglas*, 124 Wis. 15, 102 N. W. 315.

75. **Acquisition of exempt property to evade taxation.**—In re *Peoples' Bank*, 203 Ill. 300, 67 N. E. 777.

J., the owner of a bank, February 29, 1876, purchased through a bank in New York government bonds, which, with the premium thereon, amounted

to \$41,650. He left them with the bank, and on March 7th sold them at an advance of \$33 over all expenses, being slightly less than the interest accruing on the bonds. Held, a mere device to evade taxation, and, even though it were otherwise, the amount paid therefor was subject to assessment on March 11th, when the assessment was made, for, while the assessor's duty commences March 1st, it continues to run until his returns are made to the county clerk, and all property found within his precinct in the mean time is to be assessed. *Jones v. Seward*, 10 Neb. 154, 4 N. W. 946.

Where a private banker purchases on March 3, 1886, certain United States bonds, and on May 17th following returns the same as exempt from taxation and still owns them in June of that year, this alone does not show that the bonds were purchased as a means of evading taxation. *Dixon v. Halstead*, 23 Neb. 697, 37 N. W. 621.

76. **Place of taxation of bank's realty.**—*Tremont Bank v. Boston*, (Mass.), 1 Cush. 142; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Orange*

statute providing that the property of corporations and firms shall be listed for taxation by the principal accounting officer, or by an agent or partner thereof, a listing of the entire property of a banking firm by the cashier and principal accounting officer thereof in the county of his residence is proper, though the other partner resides in another county.⁷⁷ Under a statute providing that the personalty, moneys, and credits connected with or growing out of all business transacted directly or indirectly by or through the servants, employees, or agents of any bank having an officer or agency for the transaction of business in more than one assessment district, shall be taxable in the assessment district where said business is done, notes taken by a branch bank in the ordinary course of business, and which were held as a part of its assets, are taxable in the district where such bank is located, though they have been transferred and credited by the parent institution to another branch bank.⁷⁸ Under the Massachusetts statutes it is provided that all personal estate shall be assessed to the owner in the city of which he is a resident, except that all goods, wares, merchandise, and other stock in trade in cities other than where the owner resides shall be taxed in those places where the owner hires or occupies manufactories, stores, shops, or wharves. Under such statute it has been held that where one resides in one city and carries on the business of a banker and broker at an office in another city, the capital used in the business is taxable at the place of his residence.⁷⁹

Shares of Bank Stock.—In the absence of statutory provision to the contrary, shares of bank stock are to be taxed at the place of the owner's domicile.⁸⁰ State legislatures may, however, and in some jurisdictions have

Nat. Bank *v.* Williams, 58 N. J. L. 45, 32 Atl. 745.

Real estate belonging to a savings bank is properly taxed to the bank in the town where the land lies. *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

The Act of 1891 provides that the tax on real estate and visible personal estate shall be assessed in the township or district where it is found, and that the tax on other personal estate shall be assessed in the town or district where the owner resides. Held, that the banking house, and lot on which it is erected, of any bank, is to be assessed to the bank in the district where the bank is located, and the value of such house and lot are not to be considered, in determining the assessable value of stockholders' shares. *Orange Nat. Bank v. Williams*, 58 N. J. L. 45, 32 Atl. 745.

Upon a proper construction of the state and federal statutes, it is apparent that real estate owned in Indiana by a national bank should be assessed for taxation as realty in the town where situated, and not as a part of

the capital stock of the bank. *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341.

77. Listing of property of bank at residence of principal accounting officer.—*Swallow v. Thomas*, 15 Kan. 66.

78. Notes taken by branch bank taxable where bank located.—*Farmers', Loan, etc., Co. v. Fonda*, 114 Iowa 728, 87 N. W. 724.

79. Capital of banker taxable at place of his residence.—*Prince v. Boston*, 193 Mass. 545, 79 N. E. 741.

80. Taxation of shares of bank stock at domicile of owner.—*Hartford Fire Ins. Co. v. Hartford*, 3 Conn. 15; *Savings Bank v. New London*, 20 Conn. 111; *Madison v. Whitney*, 21 Ind. 261; *Goldsbury v. Warwick*, 112 Mass. 384; *Howell v. Cassopolis*, 35 Mich. 471; *Strong v. O'Donnell (Pa.)*, 31 Leg. Int. 269, 10 Phila. 575; *Nashville v. Thomas*, 45 Tenn. (5 Coldw.) 600; *Watson v. Fairmont*, 38 W. Va. 183, 18 S. E. 467.

Stocks in banks are taxable under the law of Tennessee at the place where the owner resides, when he is an in-

seen fit to provide for the taxation of shares of bank stock elsewhere than at the place of the owner's domicile, and have made the domicile of the bank the situs for the taxation of such stock.⁸¹

habitant of the state. *Nashville v. Thomas*, 45 Tenn. (5 Cold.) 600.

Shares of bank stock, not having been separated by the legislature of Pennsylvania from the person of their owner, are to be taxed in the town or city where he resides. *Strong v. O'Donnell* (Pa.), 31 Leg. Int. 269, 10 Phila. 575.

Under W. Va. Acts 1875, c. 54, shares of bank stock are assessable to the holder thereof in the district only where he resides, and then only in case they have not been included in the assessment of the capital stock of the bank where it does business; and if a city in which an incorporated bank does business neglects to assess the capital stock, as it has a right to do, it can not assess a nonresident shareholder with the value of the shares held by him. *Watson v. Fairmont*, 38 W. Va. 183, 18 S. E. 467.

Municipal corporations can not tax bank stock owned by nonresidents of the city, because such stock can have no location or situs other than the domicile of the owners. *Madison v. Whitney*, 21 Ind. 261.

Bank stock, owned by a savings society, there being no clause of exemption in its charter, is liable to taxation in the place where its office is established. *Savings Bank v. New London*, 20 Conn. 111.

The fact that an owner of bank shares has made an unintentional mistake in the statement required by St. 1872, c. 321, § 6, as to his residence, will not prevent his property being properly taxed upon them in the town wherein he resides. *Goldsbury v. Warwick*, 112 Mass. 384.

Under Comp. Laws of Michigan 1871, § 974, as it existed prior to the Act of 1875 (S. L. 1875, p. 185), shares of nonresidents of the place where the bank was located, who were not nonresidents of the state, were not taxable anywhere. *Howell v. Cassopolis*, 35 Mich. 471.

The general statute (Sess. Laws 1875, p. 185) providing for the taxation of bank stock held by nonresidents of the town in which the bank is located, who are residents of another township in the same county, in the township where they reside, the charter of the village of Cassopolis, authorizing the taxation of "all property, real and per-

sonal, within the limits of said village," not exempt from taxation for county and township purposes, does not warrant the taxation by the village of the shares of stockholders who reside in another township in the same county. *Howell v. Cassopolis*, 35 Mich. 471.

The stock of a nonresident can in no proper sense be regarded as personal property within the village where the bank is located, unless some statute has so declared. Intangible property, like stock, must always follow the domicile of the owner, unless separated from it by positive law. *Howell v. Cassopolis*, 35 Mich. 471.

Bank stock, the property of an incorporated insurance company, required by its charter to keep, and actually keeping, its office in the city of Hartford, is not taxable in the town of Hartford. *Hartford Fire Ins. Co. v. Hartford*, 3 Conn. 15.

Bank stock of deceased taxable to administrator in place of latter's residence.—Under Pub. St., c. 56, providing that personal property of a deceased person in the hands of an administrator is taxable to the resident administrator, in the town in which such administrator resides, bank stock of a deceased is taxable to his administrator, in the town in which the administrator resides, and can not be taxed to the heirs in the town where they reside, since § 26, providing that the estate of a person deceased may be taxed to the widow, to any of the children, to the heirs, or to any other person who will consent to be considered as in possession thereof, applies only to cases where at the time of the assessment no administrator has been appointed. *Kent v. Exeter*, 68 N. H. 469, 44 Atl. 607.

Determination by assessor as to place of taxation.—An assessor has jurisdiction to determine that stock in a bank is located outside the state, owned by a resident of the county, is assessable in the county, and the assessment, though it may be erroneous, is not void. *Van Wagenen v. Lyon*, 74 Iowa 716, 39 N. W. 105.

81. Statutory provision for taxation at domicile of bank.—*London v. Hope*, 26 Ky. L. Rep. 112, 80 S. W. 817; *Bedford v. Nashville*, 54 Tenn. (7 Heisk.) 409; *McLaughlin v. Chadwell*, 54 Tenn. (7 Heisk.) 389; *State v. Lewis*, 118

Deposits.—The situs of taxation of deposits in banks depends upon whether such deposits are considered as the property of, and taxable to, the bank, or the depositor.⁸² When taxable to the depositor, the domicile of the latter is the place where such deposits should be taxed.⁸³

§ 328 (2) National Bank Shares.—Shares of stock in national banks are personal property, and though they are a species of personal property which, in one sense, is tangible and incorporeal, the law which created them can separate them from the person of their owner for the purposes of taxation, and give them a situs of their own,⁸⁴ and this has been done by the act of congress declaring such shares of stock to be taxable where the bank is located and not elsewhere.⁸⁵ Such provision is not a violation of the consti-

Wis. 432, 95 N. W. 388. And see *South Nashville St. R. Co. v. Morrow*, 87 Tenn. (3 Pickle) 406, 11 S. W. 348, 2 L. R. A. 853.

The Ky. Act March 21, 1900, p. 66, c. 23, § 3, providing for retrospective taxation of bank stock is not invalid in making the situs therefor the domicile of the bank, whereas theretofore the situs for taxation of such stock was the domicile of the owners of the shares; the act providing for such retrospective taxation only of shares which had escaped taxation. *London v. Hope*, 26 Ky. L. Rep. 112, 80 S. W. 817.

Rev. St. of Wis. 1898, § 1042, provides that all the stock of every bank and the capital stock of every person, association, or other corporation whatever, engaged in banking, shall be assessed and taxed in the county and assessment district where such bank or banking association, or where such person, association, or corporation, is located for the transaction of business. Section 1044 provides that bank stock shall be entered in the names of the holders of the several shares thereof, respectively. Held, that the interests of members of a banking partnership in its capital, which consisted of realty contributed by each of them, were properly assessed to each member at the place where the business was conducted. *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

The capital stock of the bank should be listed for taxation in the county where such bank is located. *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78.

Stock of another corporation, held by a savings bank, can not be taxed to the bank in the place where the bank is situated. *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

82. See ante, "Deposits," § 326 (1f).

A national bank located in New Jersey, which, for the convenience of persons in Philadelphia, keeps a clerk there to receive deposits, is not located in Philadelphia, so as to be liable to taxation. *National State Bank v. Pierce*, Fed. Cas. No. 10,052.

83. **Taxation of deposits, as property of owner, at domicile of latter.**—*Grundy County v. Tennessee, etc., R. Co.*, 94 Tenn. (10 Pickle) 295, 29 S. W. 116.

Cash on deposit in a bank is, in legal effect, a chose in action, and is taxable at the domicile of the owner. *Grundy County v. Tennessee, etc., R. Co.*, 94 Tenn. (10 Pickle) 295, 29 S. W. 116.

Deposits in bank to the credit of testator's estate, consisting of estate given him by his wife for life, and of unused income therefrom, are taxable where the widow lives. *Harting v. Lexington*, 19 Ky. L. Rep. 1829, 43 S. W. 415.

84. **National bank shares may be given situs for purpose of taxation.**—*Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189; *North Ward Nat. Bank v. Newark*, 39 N. J. L. 380.

85. **Statutory requirement of taxation where bank located.**—National banking act of 1864, § 41, re-enacted in 1868; U. S. Rev. Stats., § 5219.

United States.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Bristol v. Washington*, 177 U. S. 133, 44 L. Ed. 701, 20 S. Ct. 585; *First Nat. Bank v. Covington*, 103 Fed. 523; *Austin v. Alderman* (U. S.), 7 Wall. 694, 19 L. Ed. 224; *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

Alabama.—*McIver v. Robinson*, 53 Ala. 456.

Illinois.—*First Nat. Bank v. Smith*, 65 Ill. 44.

tutional rule requiring uniformity of taxation.⁸⁶ The act of congress of 1868, re-enacting the law giving a legislative construction to the words, "place where the bank is located, and not elsewhere," as used in § 41 of the Act of 1864, as to which the decisions had not been in harmony,⁸⁷ permitted

Maine.—Packard *v.* Lewiston, 55 Me. 456.

Michigan.—Howell *v.* Cassopolis, 35 Mich. 471.

New Jersey.—Fox *v.* Haight, 31 N. J. L. 399; Jewell *v.* Hart, 31 N. J. L. 434; Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347; De Baun *v.* Smith, 55 N. J. L. 110, 25 Atl. 277; Crossley *v.* East Orange, 62 N. J. L. 583, 41 Atl. 712.

New York.—People *v.* Commissioners, 35 N. Y. 423; Utica *v.* Churchill, 43 Barb. 550.

North Carolina.—Kyle *v.* Fayetteville, 75 N. C. 449; Buie *v.* Fayetteville, 79 N. C. 267.

Pennsylvania.—Bucks *v.* Ely (Pa.), 6 Phila. 414.

Tennessee.—Nashville *v.* Thomas, 45 Tenn. (5 Coldw.) 600.

Vermont.—Clapp *v.* Burlington, 42 Vt. 579, 1 Am. Rep. 355.

Shares of the capital stock of a national bank are taxable as personal property by the state in which the bank is located, regardless of the residence of the stockholders. *McIver v. Robinson*, 53 Ala. 456.

The tax prescribed in National Banking Act 1864, § 41, must be levied upon the individual shareholders, and not upon the capital stock of the bank in the aggregate; and this at the place where the bank is located, without regard to their domicile. The rule that personal property has no situs of its own is one of convenience only. *First Nat. Bank v. Smith*, 65 Ill. 44; *People v. Commissioners*, 35 N. Y. 423.

Under the federal statute, stock in a national bank can not be taxed in any state other than that in which the bank is located. *De Baun v. Smith*, 55 N. J. L. 110, 25 Atl. 277.

The stock of a national bank located in New Jersey, held by a resident of Pennsylvania, is not liable to taxation in the latter state. *Bucks v. Ely* (Pa.), 6 Phila. 414.

Act Cong. 1864, c. 106, § 41, providing that the shares of national bank stock may be assessed for taxation by the state, "at the place where such bank is located, and not elsewhere," applies to banks organized under Act Cong. 1863, c. 58, as well as to those organized under the Act of 1864. *Utica v. Churchill*, 33 N. Y. 161.

86. Not a violation of constitutional requirement of uniformity.—*Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

87. Decision under original Act of 1864.—*Quære*, whether the general assembly of a state could, under the provisions of the original act of congress, in relation to taxing the national bank shares, provide for the taxation of shareholders at any other place within the state than that in which the bank was located. *Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189.

The word "place," as used in the proviso in Act Cong. June 3, 1864, c. 106, § 41, permitting state taxation of shares in national banks, refers to the location of the bank, and not to the state authority under which the tax is to be assessed; and shares held by a citizen are taxable in the town where the bank is located, and not where he resides. *Packard v. Lewiston*, 55 Me. 456.

Act Cong. June 3, 1864, authorizing the taxation, under state authority, of the shares of national banks, provided that such shares should be assessed "at the place where said bank is located, and not elsewhere," held that, with regard to a state tax, the word "place" meant state, and, with regard to a county and township or city tax, it meant those localities, respectively. *Fox v. Haight*, 31 N. J. L. 399.

Shares of nonresident stockholders in national banks are taxable at the place where the bank is located. *Farmers' Nat. Bank v. Cook*, 32 N. J. L. 347.

By the statutes of New York prior to Laws 1865, c. 97, § 10, stockholders in national banks could be taxed on their shares only in the town or ward in which they resided. *Utica v. Churchill*, 33 N. Y. 161.

Stockholders in a national bank can not be taxed for the stock held by them in the town or ward in which such bank is located, when they reside elsewhere, notwithstanding the proviso in § 41 of the Act of Congress of 1864, declaring that such stockholders are taxable at the place where the bank is located, and not elsewhere. The place of taxation is determined

the state to determine and direct the manner and place of taxing resident shareholders,⁸⁸ but provided expressly that nonresidents should be taxed

by the statute of the state. *Utica v. Churchill* (N. Y.), 43 Barb. 550.

Stockholders in a national or state bank, the capital of which is invested wholly or in part in bonds or securities of the United States, are subject to taxation under state authority at the place where such bank is located, and not elsewhere, upon the value of their respective shares of the capital of such bank, and non-resident stockholders are liable to such taxation in the same manner and to the same extent as resident stockholders. *People v. Commissioners*, 35 N. Y. 423.

Act May 20, 1864, empowering the authorities of Fayetteville to impose the same tax on nonresidents, pursuing their ordinary vocations in the town, as upon the residents, authorizes a tax upon the shares in a national bank located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits. *Moore v. Fayetteville*, 80 N. C. 154, 30 Am. Rep. 75.

The act of congress requires that states shall assess for taxes shares of stock in national banks at the place where the bank is located, and not elsewhere. Held, that a law of the state, assessing for taxation such shares at any other than the place where the banks are located, is void. *Nashville v. Thomas*, 45 Tenn. (5 Coldw.) 600.

88. State empowered to determine and direct place of taxing resident shareholders.—*Tappan v. Merchants' Nat. Bank* (U. S.), 19 Wall. 490, 22 L. Ed. 189; *Howell v. Cassopolis*, 35 Mich. 471; *Strong v. O'Donnell* (Pa.), 31 Leg. Int. 269, 10 Phila. 575; *Clapp v. Burlington*, 42 Vt. 579, 1 Am. Rep. 355.

The state may direct the manner and place of taxing the shares of national bank stock of resident owners, and, the legislature not having separated such shares from the person of their owner, their situs, like that of other personal property, is at the domicile of their owner, and not necessarily where the bank was located. *Strong v. O'Donnell* (Pa.), 31 Leg. Int. 269, 10 Phila. 575.

As the national banking law (Rev. St., § 5219) authorizes the taxation of national bank stock in the hands of individuals in such manner and place

as the state may determine, subject only to the conditions that the rate shall not exceed that of taxation on other moneyed capital of citizens, and that nonresidents of the state, holding stock, shall be taxed in the city or town where the bank is located, the legislation of Michigan (Sp. Laws 1875, p. 185), providing for the taxation of such stock in the township where the bank is located, except that, where a stockholder resides in another township in the same county, he is taxable in his own township, is valid. *Howell v. Cassopolis*, 35 Mich. 471.

Pub. Laws of Me. 1867, c. 126, § 2, providing that shares of national banks shall be assessed to the owners in the place where the bank is located, is not at variance with Act of Cong. June 3, 1864, c. 106, § 41, relating to the taxation of national banks. *Packard v. Lewiston*, 55 Me. 456.

Under the Revenue Laws of 1874-75, c. 184, shares in national banks must be taxed at the place where the owner or person required to list them resides. *Buie v. Fayetteville*, 79 N. C. 267.

The proviso to section 41 of The National Banking Act of June 3, 1864, allowing the assessment and taxation of shares in a national bank against the owner "imposed by or under state authority at the place where such bank is located, and not elsewhere," merely requires that the state having jurisdiction at the place where the bank is located shall tax the bank shares, and is not in conflict with a statute requiring shares in a national bank to be assessed where the owner resides. *Clapp v. Burlington*, 42 Vt. 579, 1 Am. Rep. 355.

Act Cong. June 3, 1864, § 41 (13 Stat. 111), allowing shares in national banks to be included in the valuation of the property of their owners, "in assessment of taxes imposed by or under state authority at the place where such is located, and not elsewhere," does not prohibit a state from listing and taxing shares in the town or city where the owner lives, instead of in that wherein the bank is located. The word "place" is a very indefinite term, and must be construed with reference to the connection in which it is used, the subject-matter spoken of, and the object in view. The intention of congress was to prevent

only in the city or town where the bank was located.⁸⁹

§ 329. Levy and Assessment—§ 329 (1) Mode of Assessment—§ 329 (1a) As Determined by Statute and Charter.—In General.—States having the power to tax banks and their property, it follows that they may, by statute, prescribe the manner in which such taxes shall be assessed,⁹⁰ and, when the mode has been fixed, or when the manner of assessment has been incorporated in the charter of the bank, it is conclusive on

unjust and unequal taxation that might result from the action of state governments hostile to the system. The sole object of the provision was to prevent the same stock being taxed in two different states, when the bank is located in one state and the stock therein owned by the inhabitants of another. The reference to the place where the bank is located is solely to determine what state shall have jurisdiction to tax the owners of the stock for such stock. *Clapp v. Burlington*, 42 Vt. 579, 1 Am. Rep. 355.

Rev. St. U. S., § 5219, permits the taxation of the shares of stock of national banks in the cities where they are located, but does not require such taxation in the absence of local legislation regulating it. Laws 1897, Act No. 51, § 1, provides that all shares of stock of every national bank shall be assessed and taxed in the county where the bank is located; and Phoenix City Charter authorizes the city to levy taxes on all real and personal property within the city. Held, that the shares of stock of a national bank located in such city, and owned by nonresidents, can not be taxed by it, since the general law only authorizes such taxation by counties, and, being a class of property that takes the situs of the owners, to be taxable under the charter it must be owned by residents of the city. *National Bank v. Long*, 6 Ariz. 311, 57 Pac. 639.

89. Nonresidents to be taxed in city or town where bank located.—*Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904, 7 S. Ct. 839; *First Nat. Bank v. Covington*, 103 Fed. 523; *Tappan v. Merchants' Nat. Bank (U. S.)*, 19 Wall. 490, 22 L. Ed. 189; *Howell v. Cassopolis*, 35 Mich. 471; *First Nat. Bank v. Province*, 20 Mont. 374, 51 Pac. 821; *Crossley v. East Orange*, 62 N. J. L. 583, 41 Atl. 712; *Kyle v. Fayetteville*, 75 N. C. 449.

The shares of capital stock of a national bank owned by a nonresident the bank must be assessed for taxes in the taxing district where the bank is located, in accordance with Rev. St.

U. S. p. 1009, § 5219, and 3 Gen. St. N. J. p. 3302, par. 101. *Crossley v. East Orange*, 62 N. J. L. 583, 41 Atl. 712.

90. Power of state to tax banks.—See ante, "Power of State," § 324 (1).

The scheme of taxing bank shares, not only in respect to the amount, but also as to the method and manner of its imposition, stands by itself, independent of and separate from that prescribed for the assessment and taxation of other property, and hence the charter provisions do not apply to the taxation of bank stock, but its taxation is governed by §§ 35, 36 of the general law (Laws 1896, p. 810, c. 908). Order 120 App. Div. 838, 105 N. Y. S. 993, reversed. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592.

As the act under which the national bank shares were assessed for 1906 did not permit any discrimination against them, or impose any rate of taxation greater than was assessed upon other moneyed capital, they may not complain of a delay in the making of the assessment for that year. *Hager v. Citizens' Nat. Bank*, 127 Ky. 192, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

Though the word "assessments," as applied to taxation, ordinarily implies an official listing of the persons and property to be taxed, and a valuation of the property of each person as a basis of apportionment, usually performed by officials specially appointed for the purpose, in the case of taxes laid on solvent securities, the nominal or face value of which is identical with the actual value, the assessment may be made by the legislature without the intervention of the assessing officer. *State v. Clement Nat. Bank*, 84 Vt. 167, 78 Atl. 944.

Necessity for compliance with statute.—Where the record shows that a savings bank has capital stock which is subject to taxation, no recovery of the tax can be had where the record does not show the assessment and levy were such as the law required. *Westminster v. Westminster Sav. Bank*, 92 Md. 62, 48 Atl. 34.

the state until the repeal of such statute.⁹¹ The power of taxation being an incident to sovereignty, and the right to tax being an extraordinary one, it must be exercised pursuant to the authority given, so that an assessment of bank stock against a bank in the manner prescribed by a repealed law and inconsistent with the existing law, which called for assessment to the individual owners, was invalid and unenforceable.⁹² Where, however, a tax has been legally assessed and due, the repeal of the act under which the assessment was made does not affect the assessment made under it.⁹³

91. Conclusiveness of statute and charter fixing mode of assessment.—See ante, "Irrevocability of Statutes Providing for Mode of Taxation and Exemptions," § 327 (2).

A provision in a general banking law providing that the stock of all corporations organized thereunder shall be taxed the same rate as other personal property is binding on the state and all municipal corporations deriving their authority from the state. *New Orleans v. Southern Bank*, 11 La. Ann. 41.

Act Feb. 24, 1845, § 60, incorporating the state bank of Ohio and other banking corporations, and providing for a specific mode of taxing banks organized under such act, created a contract between the state and each of such companies, and limited the state's power of taxation to the mode prescribed therein. *Commercial Bank v. Bowman*, 1 Handy 246, 12 O. Dec. 125.

The act incorporating the Northern Bank of Kentucky, requiring payment by it to the state of a tax of 25 cents per annum on each share of stock of \$100, which might be increased to not exceeding 50 cents, was a contract between the state and the stockholders, exempting the stock from any other taxation, and preventing the Act of 1837 "to equalize taxation" from applying to the stock. *Johnson v. Commonwealth (Ky.)*, 7 Dana 338.

Laws 1865, c. 97, enabling state banks to avail themselves of the act of congress and become national banks, and prescribing the mode in which state banks should be converted into national banks, and also providing by a general law how the bank shares should be taxed, did not create a contract, in favor of state banks, that the bank shares should not be assessed for more than their par value. *Gallatin Nat. Bank v. Commissioners*, 67 N. Y. 516.

A bank chartered under the Act of 1824, which prescribes the payment of a certain tax on dividends declared, is subject to a subsequent general law,

which increases the rate of taxation, although its charter had not then expired, and such law is constitutional. *Commonwealth v. Easton Bank*, 10 Pa. 442.

A general law, taxing the dividends of banks, was passed on the 1st of April. On the 7th an act was passed extending the charter of an existing bank from a future period, when the former charter would expire. The act of the 7th contained a provision for taxation similar to that of the 1st, but the taxes were not to be levied under it until the new charter went into operation. Held, that the latter act did not repeal the former. *Commonwealth v. Easton Bank*, 10 Pa. 442.

Acts 1897, c. 1, § 16, provides that in all cases where, by the charter of a corporation, its shares of stock are wholly or partially exempt from taxation, or in which a rate of taxation on such shares is fixed and declared to be in lieu of all other taxes, such corporation shall be assessed, at a rate uniform with the rate levied on other taxable property, on its capital stock, etc. Section 26 declares that, when any corporation has not been assessed as contemplated by the act, it may be cited, and a proper tax levied, etc. Under the charter of the city of Memphis the taxes for one year were fixed by the assessment for the preceding year. Held that, as there was no legislative authority to assess the capital stock of a bank when the assessment for 1896 was made, and therefore it could not be assessed at that time, there was nothing on which to base an assessment for 1897, and it could not be assessed as omitted property. *Union, etc., Bank v. Memphis*, 107 Tenn. 66, 64 S. W. 13.

92. Assessment in manner prescribed by repealed law invalid.—*Klauss v. Citizens' Nat. Bank*, 46 Ind. App. 683, 93 N. E. 558.

93. Effect of repeal of act upon assessment made thereunder.—*State v. Waterville Sav. Bank*, 68 Me. 515.

The repeal of Acts 1876, cc. 260, 340, providing a system of assessment and

Validity of Statutes Providing for Retrospective Assessments.—

The state may provide for the retrospective assessment of a bank's property for taxation.⁹⁴

Construction of Remedial Statutes Relating to Taxation.—Remedial statutes enacted for the purpose of curing defects in prior laws, and to place all banking institutions in the state upon exactly the same footing so far as taxation is concerned, must be liberally construed to effectuate such intention.⁹⁵

Effect of Statutes Substituting New Liability.—Where it is apparent that the intent of a statute relating to the taxation of banks or shares of stock therein is to substitute a new liability for the old as of a certain date, and to relieve the bank or its stockholders from all liability after such date under any other law, such statute is self-executing, and operates to take the property from the roll, and avoid any assessment made.⁹⁶

§ 329 (1b) Report or Statement by Bank.—In General.—In many states, banks or certain classes thereof are required to make, and file with the assessor, a written or sworn statement of the bank's property,⁹⁷

collection of taxes by Acts 1878, c. 413, supplanting the former act by making material changes in the system, did not affect an assessment of taxes under the former act, made prior to the taking effect of the latter act. *Appeal Tax Court v. Western Maryland R. Co.*, 50 Md. 274.

A tax regularly assessed under the Act of March 21, 1851, to tax banks and bank and other stocks the same as other property, is not remitted by the repealing clause of the Act of April 13, 1852, for the assessment and taxation of all property in the state, and for levying taxes thereon according to the true value in money. *Debolt v. Ohio Life Ins., etc., Co.*, 1 O. St. 563.

94. Validity of state statutes providing for retrospective assessment.—*Richardson v. State Nat. Bank*, 135 Ky. 772, 123 S. W. 294, 1189.

The amendment to Pol. Code Cal. § 3608, providing for the taxation of national bank shares (St. 1899, p. 96), which went into effect March 14, 1899, was not retroactive, and did not authorize the assessment of such shares for the fiscal year beginning in 1899. *Dodge v. Nevada Nat. Bank*, 48 C. C. A. 626, 109 Fed. 726.

95. Construction of remedial statutes relating to taxation.—*Hager v. Citizens' Nat. Bank*, 127 Ky. 192, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

96. Effect of statute changing liability to taxation from certain date.—*First Nat. Bank v. Binghamton*, 76 N. Y. S. 526, 72 App. Div. 354.

Laws 1901, c. 550, which became effective April 25th of that year, provided that all assessments of the shares of banks made on or after January 1, 1901, should be void, and another assessment made pursuant to the statute. Held, that the statute substituted the new liability for the old, as of January 1, 1901, and relieved the stockholders of banks from all liability after January 1, 1901, under any other law. *First Nat. Bank v. Binghamton*, 72 App. Div. 354, 76 N. Y. S. 526.

97. Return by bank of assessment of property.—*Seward v. Cattle*, 14 Neb. 144, 15 N. W. 337.

Pol. Code, § 3701, providing for the making of a sworn written statement to the assessor showing all property belonging to or under the control of any corporation of which the taxpayer is president, secretary, or managing agent, and of all solvent credits due or owing to any corporation of which he is such an officer, deducting from the sum the total of such credits debts owing by such person or corporation, applies to both natural persons and corporations, and under it a state bank or trust company may deduct from its solvent credits its just debts, provided it makes the proper return to the assessor, and claims the reduction, and otherwise complies with the law; and all its remaining property is subject to taxation in the same manner as the property of a natural person. *Daly Bank, etc., Co. v. Board*, 33 Mont. 101, 81 Pac. 950.

The plaintiff bank filed with the

capital,⁹⁸ assets, deposits,⁹⁹ and to deliver to the assessor or auditor a state-

county board of equalization a statement of its assessable property in that county, and asked to be allowed to deduct as indebtedness the individual deposits of its customers. Subsequently, on being allowed to make an amended return, it attached to the original list and submitted a list of names of individual depositors, and the amount deposited, with a statement that the deposits there mentioned were all due and payable at the bank. This was not sworn to. Held, that this was not a compliance with Hill's Code, § 2752, which provides, among other things, that no such indebtedness shall in any case be deducted unless the person assessed "delivers to the assessor a written statement," duly sworn to, specifying the name and place of residence of the creditor, the nature of the debt, the names of other parties, if any, who are liable therefor, and which statement shall show that the debt or portion sought to be deducted has not been deducted in any other county, etc., and that the action of the board in refusing the deduction was right. Oregon, etc., Sav. Bank v. Catlin, 15 Ore. 342, 15 Pac. 462.

Returns by private bankers.—The Missouri statute of 1889, relating to the revenue, after providing for the assessment of manufacturing and other corporations, and the shares of stock of incorporated banks, required that "private bankers * * * shall in like manner make return of all moneys or values of any description invested in or used in their business, which shall be taxed as other personal property." The Act of 1891 (Laws 1891, p. 195) directs that property of manufacturing companies and certain other corporations shall be assessed and taxed as that of individuals, and requires the assessment of the shares of stock in incorporated banks to the owners thereof, and provides that "private bankers * * * shall make like returns, and be assessed thereon as hereinbefore provided." Held, that the assessment of the property of a co-partnership of private bankers, in the business name adopted by them, was valid, as such Act of 1891 made no change as to the party to whom such property should be assessed. Stanberry v. Jordan, 145 Mo. 371, 46 S. W. 1093.

98. Capital.—Bank v. County Court, 36 W. Va. 341, 15 S. E. 78.

Laws of Kansas 1877, c. 37, § 12, provides that all corporations, except

banks and banking associations, manufacturing, and mining companies, shall list in the city where their principal office is kept the full amount of stock paid in and remaining as capital stock and such stock shall be taxed as other property. Shawnee v. Topeka Equipment Co., 26 Kan. 363.

Code, c. 29, § 41, declares that every person shall list his property for taxation "including the shares held by him in any national or other banks, * * * except where the same is listed under § 64." Said § 64 provides that the assessor shall ascertain from the proper officers of all incorporated companies the actual value of the capital invested by them in their business, and enter the same in his personal property book, but that, when the capital of a company is so assessed, no individual shareholder shall be required to list or be assessed with his share in said capital. Section 51 declares that, when the property, stock, or capital of any company is assessed to such company, no person owning any share or interest therein shall be required to list the same, or be assessed with the value thereof. Held that, when the assessor applies to the proper officer of a bank to ascertain the value of the capital employed in its business, it is the duty of such officer to furnish information to the assessor that will enable him to properly enter the same in his personal property book, and the directors and stockholders of the bank have no right to elect to withhold such information, and allow each shareholder to list and be assessed for his share. Bank v. County Court, 36 W. Va. 341, 15 S. E. 78.

99. Deposits.—Deposits of charitable corporations in savings banks of amounts less than \$15,000, and of persons less than \$50, which are exempt from taxation, can be made liable for the tax under Code, art. 81, § 95, requiring the president of a bank to report to the comptroller the aggregate amount of such deposits, and on the same day to pay to the treasurer the amount of the state tax thereon out of the interest payable to the depositors only by assessment for values exceeding those amounts. State v. Sterling, 20 Md. 502.

Under Code, art. 81, § 95, requiring the president of any savings bank to report to the comptroller the aggregate amount of deposits, and on the same day pay to the state treasurer

ment of the names of stockholders,¹ their residence,² and the amount of stock held by each,³ the par value of the shares,⁴ the amount paid up,⁵ the

the amount of state tax thereon out of the interest payable to the depositors, nothing further is necessary to be done to ascertain the value made liable for the tax, and such provision excludes the idea of assessment on valuation. *State v. Sterling*, 20 Md. 502.

The true taxable value of deposits in a savings bank, bearing interest, reported to the comptroller under Code, art. 81, § 95, must be ascertained by deducting from their aggregate amount the several amounts invested in United States, state, bank, and gas company's stocks, and of those non-taxable persons and corporations; the remainder being the amount liable for the tax contemplated. *State v. Sterling*, 20 Md. 502.

1. Names of stockholders.—*Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185; *Farmers', etc., Nat. Bank v. Hoffman*, 93 Iowa 119, 61 N. W. 418; *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *St. Louis, Bldg., etc., Ass'n v. Lightner*, 47 Mo. 393; *Gracy v. Catron*, 118 Mo. 280, 24 S. W. 439; *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126.

Since a bank may on behalf of its shareholders pay taxes due by them on their shares and recover from them the amount paid, the bank may be required to furnish information upon which the assessment of the shares may be made, so that all shares may be taxed alike. *Hager v. Citizens' Nat. Bank*, 127 Ky. 192, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

Ind. Act March 15, 1867, authorizing the collection of a tax on shares of capital stock owned in national banks located in this state, and requiring the president or cashier of the bank to deliver a statement of the name of each stockholder to the county auditor on or before the 15th day of March of each year, but providing that this statement might be made for the year 1867 at any time before the first day of May, required the taxation of such stock for the year 1867. *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185.

Under the Indiana Act March 15, 1867, requiring the taxation of stock in national banks, an assessment the correctness of which is not questioned will not be enjoined, because, after failure of the officers of the bank to deliver to the auditor the statement of names of stockholders as required

by the act, the auditor did not summon them before him and obtain such a statement. *Strader v. Manville*, 33 Ind. 111.

2. Residence of shareholders.—*National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *Adams v. New Bedford*, 155 Mass. 317, 29 N. E. 532.

3. Amount of stock held by each stockholder.—*St. Louis Bldg., etc., Ass'n v. Lightner*, 47 Mo. 393; *Farmers', etc., Nat. Bank v. Hoffmann*, 93 Iowa 119, 61 N. W. 418; *Gracy v. Catron*, 118 Mo. 280, 24 S. W. 439; *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

National banks are agents of their stockholders for the purpose of listing their stock for taxation and paying the tax thereon. Judgment 110 N. W. 535, reversed on rehearing. *First Nat. Bank v. Webster County*, 77 Neb. 815, 113 N. W. 190.

Laws 1897, Act No. 51, § 4, requires the shares of national bank stock to be entered and taxed in the names of the shareholders; and § 6 requires the officer in charge of any banking association to file with the assessor a sworn statement of the number and amount of shares, the names and residences of the shareholders, and the shares owned by each. Held, that the shares of all other banks, as well as national banks, should be assessed in the names of the shareholders, but, since other provisions of the act require the officers to pay all taxes due on the shares, and give them a lien thereon for such advancements, the assessment of the shares in the name of the bank is a mere irregularity, which will not warrant equitable interference. *Western, etc., Banking Co. v. Murray*, 6 Ariz. 215, 56 Pac. 728.

Act 1891 (Sess. Acts 1891, p. 195), declaring that bank shareholders need not list their stock for taxation, but that the shares shall be listed by the bank with its property; and Rev. St. 1889, § 7540, requiring that taxes assessed on bank shares shall be paid by the bank, which may recover the amount so paid from the shareholders—do not authorize the assessment of bank shares to the bank, but such

4. Par value of shares.—*Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

5. Amount paid up.—*Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

surplus or reserved fund,⁶ the undivided profits,⁷ and the amount legally invested in real estate.⁸

Increase of Valuation on Failure to Make Report or Statement.—

In some jurisdictions express provision is made for listing and assessing property and adding to the taxable valuation thereof a certain per cent as a penalty, in case of a refusal to furnish the verified statement required, or to list property for taxation.⁹

Conclusiveness of Return.—It would seem that the statement or return of property required by statute, while *prima facie* correct, is not, when made, absolutely conclusive either on the state or the bank.¹⁰ Under a stat-

shares must nevertheless be assessed against the owners of the stock. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

The fact that a county clerk certified bank stock to a supervisor who had no right to assess it will not invalidate its assessment to the owner where legally assessable, although not certified to the supervisor making such assessment. *Crittenden v. Mt. Clemens*, 86 Mich. 220, 49 N. W. 144.

Under Code 1873, § 819, providing for the taxation of shares of bank stock, and requiring the officers to furnish the assessors "the name of each person owning shares, and the amount owned by each," an assessment on the capital stock as the personal property of the bank, without mention of the shareholders, is void. *Farmers', etc., Nat. Bank v. Hoffmann*, 93 Iowa 119, 61 N. W. 418.

Compelling disclosure of names of shareholders and depositors.—A national bank may be compelled to disclose the names of its depositors, and the amounts of their deposits, under the compulsory process of a state court, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners. *First Nat. Bank v. Hughes*, 6 Fed. 737, reversing Fed. Cas. No. 4,811; affirmed in 106 U. S. 523, 27 L. Ed. 268, 1 S. Ct. 489.

Where the officers of a national bank have furnished to the assessor the statement required by Revenue Act 1891, § 21, giving the name of the bank, the number of shares, the par value of the shares, the amount paid up, the surplus or reserve fund, the undivided profits, and the amount legally invested in real estate, mandamus will not lie to compel them to furnish a list of the shareholders in accordance with Rev. St. U. S., § 5210 [U. S. Comp. St. 1901, p. 3498], since

the statement gives the assessor all the information he needs. *Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

6. Surplus or reserved fund.—*Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

7. Undivided profits.—*Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

8. Amount legally invested in real estate.—*Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

9. Increase of valuation on failure to make report or statement.—Under Code, § 1357, providing that if any person or corporation shall refuse to furnish the verified statement required, or to list his property for taxation, the assessor shall proceed to list and assess such property, and shall add to the taxable valuation 100 per cent thereof, the penalty for the failure and refusal of the proper officer of a branch bank to make return to the assessor before his books are closed and placed before the board of review can ont be avoided by making return thereafter. *Farmers, Loan, etc., Co. v. Fonda*, 114 Iowa 728, 87 N. W. 724.

10. Conclusiveness of return.—Where the president and cashier of a banking company makes out and returns under oath to the auditor of the county, a statement of its taxable assets, which is used, and the auditor discovers, after the duplicate is given out for collection, that the company had other taxable assets, not included, he may proceed, under § 46 of the general tax law of 1852, before a final settlement with the county treasurer, to correct the duplicate and charge the banking company the proper amount of tax, first having given notice to the company of such correction and additional charge, and an opportunity to show that the statement was not erroneous. *Champaign County Bank v. Smith*, 7 O. St. 42.

Under Code, § 1305, providing that all property subject to taxation shall be valued at its actual value, which

ute requiring the assessor to assess property "at its full cash value," where a bank returns a list of its property as at a certain value, and claims an unauthorized reduction of one-third of its alleged value the return of the whole amount by the assessor is not an increase of the assessments.¹¹

§ 329 (1c) Proceedings for Discovery and Valuation of Property.—Under a statute providing that, for the purpose of properly listing property for taxation, the assessor may inspect the books of corporations, it has been held that he can not examine the account of any depositor in a bank regardless of whether he is bound to pay taxes in the state.¹²

§ 329 (1d) Valuation of Bank's Property—§ 329 (1da) In General.—As a general rule the property and assets of a banking association are to be taxed just as the property of natural persons is taxed,¹³ at its actual and true value.¹⁴ In ascertaining the value of the assets of a bank for taxation, securities owned by it will be taken at their actual value when

means its value in the market in the ordinary course of trade, and § 1322, providing that shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located, and requiring the bank to aid the assessor in fixing the value of such shares, to furnish a verified statement of its financial condition, and §§ 1370, 1371, requiring the board of equalization to adjust assessments by raising or lowering the same as in their opinion will be just, contemplate that the assessor and the board may seize on any information within reach that may furnish aid to a conclusion on the subject of the value of national bank stock in assessing the same, and the authorities are not bound by the showing of the books of the bank. *First Nat. Bank v. City Council*, 136 Iowa 203, 112 N. W. 829.

The par value of the shares of stock in a national bank was \$100. The statement furnished by the bank to the assessor showed that the value of the shares did not exceed \$112. It was proved that the bank had transferred stock at \$175 per share, and it did not appear that the transfer was for purposes other than investment. Held, that the board of equalization did not err in fixing the value of the stock at \$130 per share. *First Nat. Bank v. City Council*, 136 Iowa 203, 112 N. W. 829.

A national bank which returns its capital for taxation is not thereby estopped from setting up that the same was not subject to taxation, and refusing to pay the tax. *Brown v. French*, 80 Fed. 166.

The action of the cashier of a national bank in giving in to the officers of the city for taxation against the bank a number of the shares of its stock, taxable under the laws of the state to the stockholders, does not estop a receiver subsequently appointed for the bank, but before the tax is paid, from setting up the mistake. *Wilmington v. Ricard*, 32 C. C. A. 580, 90 Fed. 214.

Where, in a proceeding to determine the value of the assessable assets of a bank, the bank had filed with the assessor a sworn statement of its assets, as required by Kirby's Dig., § 6920, which showed that its assets did not exceed the amount of its capital stock, which was \$25,000, but the bank's cashier testified, in explaining a statement made on July 1, 1901, that the bank had on that day a surplus of \$3,500, a judgment, in the absence of other testimony, reducing the assessment from \$50,000 to \$28,500, was not erroneous, as against the county. *Hempstead v. Bank*, 74 Ark. 37, 84 S. W. 1030.

11. *First Nat. Bank v. Bailey*, 16 Mont. 135, 40 Pac. 175.

12. **Proceedings for discovery and valuation — Examination of accounts of depositor.**—*Applegate v. State*, 158 Ind. 119, 63 N. E. 16.

13. **Valuation of bank's property as that of natural person.**—*Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892.

14. **Property to be assessed at actual value.**—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485; *Bank v. Miller*, 177 N. Y. 461, 69 N. E. 1103.

it exceeds their face value.¹⁵ Under an ordinance directing a tax "on all personal property, money, and creditors, including all capital stock," the personal property of a bank is to be ascertained by adding to the paid-up capital the stockholders' demand notes for unpaid stock, bearing interest, and held by the bank.¹⁶ Real estate owned by a national banking association must not be assessed at a higher percentage than other real estate of the same class and character, situated in the county and municipality where the tax is sought to be levied.¹⁷

Deduction of Indebtedness.—In some jurisdictions statutes authorizing the deduction of bona fide debts from the credits of any person required to list his property for taxation are held inapplicable to banks.¹⁸ while in others, such statutes are held to apply to both natural persons and corporations.¹⁹

15. Valuation of securities.—*Groton Sav. Bank v. Barker*, 19 App. Div. 64, 45 N. Y. S. 811, reversed in 154 N. Y. 122, 47 N. E. 1103.

16. Manner of determining personal property of bank.—*State Bank v. Richmond*, 79 Va. 113.

17. Assessment of realty owned by national bank.—*First Nat. Bank v. Albright*, 13 N. Mex. 514, 86 Pac. 548.

18. Deduction of indebtedness.—*Board v. Fidelity Sav. Ass'n*, 31 Colo. 47, 71 Pac. 376.

Tax Law April 13, 1852, § 10, allowing individuals and certain corporations in giving their tax lists to deduct their liabilities from the amount of their moneys and creditors, having been held void as in contravention of the constitution, which permits no deduction of liabilities for moneys and credits, it follows that private bankers, even though not those contemplated by Const., art. 12, § 3, can not deduct their debts from their moneys and credits. *Ellis v. Linck*, 2 O. St. xiii.

The receiver of an insolvent bank is liable for taxes on the full amount of personal property and assets of the bank, and can not deduct therefrom the amount of debts owing by the bank. *Hewitt v. Traders' Bank*, 18 Wash. 326, 51 Pac. 468.

Mills' Ann. St., § 3789, authorizes the deduction of bona fide debts from the credits of any person required to list his property for taxation, provided that nothing in such section shall apply to any bank, company, or corporation exercising banking powers or privileges. Held, that a savings association, which did business only with its members, receiving deposits on their stock which they were authorized to withdraw, and making loans to them, etc., was not a corporation ex-

ercising banking privileges within such proviso. *Board v. Fidelity Sav. Ass'n*, 31 Colo. 47, 71 Pac. 376.

Where a bank president, in his reports to the comptroller of the currency, certified that the bank owned no notes or securities which were not good, such president's liability as indorser on certain notes which he had transferred to the bank would not be considered a real liability within Code, § 1311, which authorizes the taxpayer to deduct from his moneys and credits the amounts of debts owing by him, with the exception that only so much of any liability as security for another shall be deducted as a taxpayer believes he will be compelled to pay on account of the inability of the principal debtor. *Schoonover v. Petcina*, 126 Iowa 261, 100 N. W. 490.

19. *Daly Bank, etc., Co. v. Board*, 33 Mont. 101, 81 Pac. 950.

Pol. Code, § 3695, subd. 8, relating to assessment for taxation, providing for a deduction of deposits in the hands of private bankers from moneys on hand and in transit, and providing that only deposits other than current deposits may be deducted from bills and accounts receivable and other credits, and § 3701, authorizing any taxpayer to deduct from his credits all debts then owing to him, being in direct conflict, the latter section prevails, under § 5165, providing that if conflicting provisions are found in different sections of the same chapter or article, the last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article. *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

That a bank possessed money and real estate subject to taxation, but

Deduction of Deposits.—In those jurisdictions where bank deposits are taxable to the bank as its property, rather than to the depositors,²⁰ it is generally held that banks, in ascertaining their property for taxation, are not entitled to deduct deposits held by them from their gross assets, moneys and credits.²¹ In the case of savings banks, however, it is held in some

which was not assessed because of the mistaken deduction of debts, does not affect the question of its liability under an assessment of credits from which they are entitled to have the debts deducted. *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

Moneys due a bank from other banks are credits within Pol. Code, § 3680, defining credits as solvent debts, secured or unsecured, owing to a person. *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

That a bank demanded that in assessing its property for taxation its deposits be deducted from the amount of moneys on hand and in transit as provided in Pol. Code, § 3695, subd. 8, does not affect its right to have its indebtedness deducted from its credits, as authorized by § 3701. *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

20. See ante, "Deposits," § 326 (1f).

21. **General rule as to deduction of deposits.**—*Security, etc., Trust Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3; *Bank v. Oxford*, 70 Miss. 504, 12 So. 203; *Ellis v. Linck*, 3 O. St. 66.

Const., art. 13, § 1, provides that all property in the state, not exempt under the laws of the United States, shall be taxable; that the word "property" includes moneys, credits, etc., and that the legislature may provide, except in the case of credits secured by mortgage, for a deduction of credits or debts due bona fide residents of the state. Los Angeles City Ordinance, § 4, subd. 5 (a copy of Pol. Code, § 3629, subd. 6), provides that the taxpayer may deduct from his solvent unsecured credits his unsecured debts owing to bona fide residents of the state. Pol. Code, § 3617, subd. 6, as amended by Laws 1881, provides that credits or debts arising on account of any money deposited with savings or loan corporations shall, for the purpose of taxation, be deemed an interest in the property of such corporation, and shall not be assessed to the creditors thereof. Held that, if there be any conflict between such ordinance and § 3617, the latter governs, as being a "general law," and a loan and savings bank doing business

in the city of Los Angeles is not entitled, for the purposes of municipal taxation on its property, to a deduction from its solvent unsecured credits of its unsecured liability to its depositors for money deposited. *Security, etc., Trust Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3.

A contention that the debts of such bank are not, for the purpose of taxation, within § 3617, on the ground that they are not ordinary deposits, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses of the bank, can not be sustained; Civ. Code, § 571, under which such bank was organized, providing that corporations organized for the purpose of loaning funds of their depositors may loan the funds thereof, receive deposits of money, loan the same and repay depositors, with or without interest—the method in which such bank conducted its business. *Security, etc., Trust Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3.

A decree taxing the bank as an individual, and deducting from its choses in action its liabilities in the shape of deposits, is erroneous. *Bank v. Oxford*, 70 Miss. 504, 12 So. 203.

Const., art. 12, § 3, enacted that the General Assembly shall provide for taxing the notes and bills, discounted or purchased, moneys loaned, and all other property, effects, or dues of every description, without deduction, of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on property of individuals. Held, that banks were not entitled to deduct from the gross amount of their moneys and credits, including those appertaining to their business, deposits held by them, unless specially made. *Ellis v. Linck*, 3 O. St. 66.

Rev. St., § 3408, provides that state banks shall pay a tax of 1-24 of 1 per cent per month on the average deposits of money subject to payment by check or draft, or represented by certificates of deposit or otherwise whether payable on demand or at some

jurisdictions that for the purpose of ascertaining the amount of property of a savings bank, liable to taxation, the amount of its deposits is to be deducted from its gross assets as a liability.²² Under statutes providing that private bankers shall list for taxation their money on hand and in transit, and in the hands of others subject to draft, except treasury notes, and their bills receivable and other credits, and that from this aggregate shall be deducted the amount of "money on deposit," it has been held that private bankers are entitled to deduct the full amount due depositors, though part of the money deposited may have been treasury notes; "money on deposit" being general deposits, and not special deposits held by the bank as a bailee.²³

§ 329 (1db) Valuation of Franchises and Privileges.—A franchise

future day. Plaintiff, as such bank, received for deposit checks and drafts on other city banks, which were sent by it to another bank to be put through the clearing house, necessitating the keeping of a large balance in such other bank as to meet any balances that might be due from plaintiff to such bank on account of those clearances. Held, that the checks and drafts upon other city banks constituted a part of plaintiff's deposits subject to payment on check or draft, and should be included in determining the average daily deposits for the purpose of taxation. *Bank v. Weber*, 41 Fed. 413.

But checks of country banks, deposited with plaintiff, which were not considered as subject to payment on check or draft until they had been sent to the respective country banks against whom they were drawn, and returned as good, should not have been included in the average daily deposits until such return was made. *Bank v. Weber*, 41 Fed. 413.

Under Pub. St., c. 13, § 20, providing for a tax on savings banks of a percentage, to be paid semiannually, on the average amount of deposits for the six months preceding, the tax is to be computed on the amount deposited, together with the interest and dividend accruing and payable to depositors, and does not include the guaranty fund of the bank, nor the undivided profits. *Suffolk Sav. Bank v. Commonwealth*, 151 Mass. 103, 23 N. E. 728.

22. Deduction of deposits in assessing property of savings banks.—*Bridgeport Sav. Bank v. Barker*, 154 N. Y. 128, 47 N. E. 973, affirming order 17 Misc. Rep. 180, 40 N. Y. S. 1001.

Moneys due from a savings bank to its depositors are debts of the

bank, and should be deducted as such from its gross assets in assessing its property for taxation. *Groton Sav. Bank v. Barker*, 19 App. Div. 64, 45 N. Y. S. 811, order reversed in 154 N. Y. 122, 47 N. E. 1103.

The primary relation of a depositor in a savings bank to the corporation is that of a creditor, and, for the purpose of ascertaining the amount of property of a savings bank liable to taxation, the amount of its deposits is to be deducted from its gross assets, as a liability. Order 17 Misc. Rep. 180, 40 N. Y. S. 1001, affirmed. *Bridgeport Sav. Bank v. Barker*, 154 N. Y. 128, 47 N. E. 973.

A savings bank which owns United States bonds, not subject to taxation, is entitled, in the estimate of its property subject to taxation, to have such bonds deducted from its apparent surplus over and above the amount of its deposits. Order 17 Misc. Rep. 180, 40 N. Y. S. 1001, affirmed. *Bridgeport Sav. Bank v. Barker*, 154 N. Y. 128, 47 N. E. 973.

23. Deduction under statute relating to private bankers.—*Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892.

In a suit to enjoin the collection of taxes, a banker testified that he had in cash in his vaults \$38,322.71, and \$40,492 with other banks, and that of this amount \$68,141 was in treasury notes. It was not shown whether the money with other banks was on general or special deposit. The bank was doing business on a capital of \$60,000. Held, that it must be presumed the money with other banks was on general deposit subject to draft, and that the evidence is insufficient to support a finding that the bank held \$68,141 in treasury notes. *Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892.

tax imposed upon savings banks in proportion to their average deposits is upon the privilege of continuing such business under a corporate organization, and the amount thereof may be ascertained upon such basis as the legislature may prescribe.²⁴

§ 329 (1dc) Valuation of Capital or Capital Stock.—While the precise mode of valuing the capital or capital stock of banks for the purpose of taxation varies in the different states, the usual method is to assess the same at its actual value, after deducting therefrom property exempt,²⁵ or property otherwise taxed.²⁶

24. Valuation of franchises and privileges.—*State v. Franklin County, etc., Trust Co.*, 74 Vt. 246, 52 Atl. 1069.

Code, art. 81, § 86, requires every savings bank to pay an annual franchise tax of one-fourth of 1 per cent on the total amount of deposits held by such bank, and provides that "no other tax shall be laid on such bank institution or corporation in respect to such deposits," but that its real estate shall be liable to taxation. Acts 1890, c. 491, which is made a part of § 86, as § 86a, prescribes that nothing in § 86 shall be construed as granting exemption from taxation to any property which is legally taxable, because of its ownership by a savings bank. Previous to the passage of § 86 the total amount of deposits of savings banks to be taxed had been ascertained by deducting from the gross amount of deposits the portion of the same invested in nontaxable securities. A bank had paid the tax of one-fourth of 1 per cent on its deposits, and a tax on its realty, but not a tax levied by a municipality on its securities. Held, that in an action to collect the municipal tax on securities purchased with deposits, that Acts 1890, c. 491, and Code, art. 81, § 86, must be construed together, and hence savings banks were liable to a franchise tax of one-fourth of 1 per cent on the total amount of their deposits, without any deduction for the portion invested in non-taxable securities, and therefore the tax on the securities was void. *Westminster v. Westminster Sav. Bank*, 92 Md. 62, 48 Atl. 34.

Under Tax Law (Laws 1896, p. 795, c. 908, Laws 1901, p. 296, c. 117), § 187b, providing that every savings bank shall pay an annual franchise tax equal to 1 per cent "on the par value of its surplus and undivided earnings," interest on investments, accrued but not payable at the time of the assess-

ment, is properly included; *Banking Law* (Laws 1892, p. 1853, c. 689), § 20, requiring the banks in making reports of their condition to state the whole amount of "interest or profits received or earned." *Bank v. Miller*, 84 App. Div. 168, 82 N. Y. S. 621, modified 177 N. Y. 461, 69 N. E. 1103.

25. Deduction of exempt property.—*Campbell v. Centerville*, 69 Iowa 439, 29 N. W. 596; *First Nat. Bank v. Board*, 41 La. Ann. 181, 5 So. 408; *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

A banker's United States bonds and treasury notes, not subject to taxation by the state, and his land taxed as such, are to be deducted from his capital, as ascertaining the amount of his capital for assessment. *Campbell v. Centerville*, 69 Iowa 439, 29 N. W. 596.

Under Comp. St., c. 77, art. 1, § 30, providing for the listing of property of bankers, brokers, etc., the amount of deposits on hand, funds in the hands of other bankers, checks, and other cash items, are proper subjects of taxation, as the property of the bank; but the amount of bills receivable, discounted or purchased, and other credits due or to become due, accounts receivable, and interest due, and unpaid, are not assessable, and should be deducted from the bank's return. *Seward v. Cattle*, 14 Neb. 144, 15 N. W. 337.

Where the tax commissioners have deducted from the assets of a foreign savings bank all its liabilities, and also all its property exempt from taxation, and all its property subject to taxation elsewhere, and have thus ascertained its surplus, and have assessed its investments in the stock of domestic corporations on that basis, such foreign bank is not entitled to a further deduction of its liabilities from the assessment thus made. *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

26. Deduction of property other-

§ 329 (1dd) Determination of Amount of Deposits.—In General.—Money or a deposit in bank subject to withdrawal on demand is not a "credit," from which, for the purpose of return for taxation, debts owing by the person making the return may be deducted.²⁷

wise taxed.—*Campbell v. Centerville*, 69 Iowa 439, 29 N. W. 596; *First Nat. Bank v. Board*, 41 La. Ann. 181, 5 So. 408; *Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

Act 1886, No. 98, § 28, provides that the shares of a bank shall be assessed to the stockholders, and that "all property owned by the bank * * * which is taxable under section 1 of this act shall be assessed directly to the bank, * * * and the pro rata of such direct property taxes, and of all exempt property proportioned to each share of capital stock shall be deducted from the amount of taxes assessed to that share under this section." Held, that the words "exempt property" do not apply to state and United States bonds. *First Nat. Bank v. Board*, 41 La. Ann. 181, 5 So. 408.

Code 1873, §§ 818, 819, provide that shares in national banks shall be listed in the names of stockholders, but that the tax shall be paid by the banks. *Rev. St. U. S.*, § 5219 [*U. S. Comp. St.* 1901, p. 3502], authorizing the taxation of national banks, provides that it "shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens," and Code 1873, § 818, contains a like restriction. *Rev. St. U. S.*, § 5219 [*U. S. Comp. St.* 1901, p. 3502], provides also that the real estate of such banks may be taxed "to the same extent, according to its value, as other real property is taxed." Code 1873, § 813, provides that "the stock of corporations" shall be assessed at its cash value. Held that, where a national bank is taxed for lands paid for out of its capital stock, the assessment upon its capital stock should be made after deducting from its cash value the value of such real estate. *First Nat. Bank v. Albia*, 86 Iowa 28, 52 N. W. 334.

Under Act April 29, 1863, requiring that all banks shall be liable to taxation on a valuation of their capital stock, equal to the amount of their capital stock paid in, or secured to be paid in, a bank was properly assessed on the whole amount of its capital stock, after deducting therefrom the amount of the cost of its real estate, and stock held by charitable institutions, though the affidavit

of the cashier stated that the bank then held securities of the United States to an amount exceeding its capital stock, and that the value of its other personal estate did not exceed the amount of debts due from the bank. *People v. Commissioners (N. Y.)*, 40 Barb. 334.

In assessing bank stock under Laws 1866, c. 761, providing for the deduction of the value of real estate from the "whole amount of the capital stock," the actual value of the stock, and not its nominal value, is to be considered. *Tradesmen's Nat. Bank v. Commissioners*, 69 N. Y. 961; reversing 9 Hun 650.

Under Tax Law (Laws 1896, c. 908), § 12, requiring capital stock to be assessed at its actual value after deducting the assessed value of the realty, and § 24, providing that in assessing shares of bank stock there shall be deducted from the value such proportionate sum as the assessed value of the realty bears to the value of the shares, in fixing the value of shares of national bank stock the assessed value of the realty, and not its full value, is to be deducted from the actual value of the shares ascertained by taking the realty and other assets at full value. Order 47 App. Div. 394, 62 N. Y. S. 321, affirmed. *Jenkins v. Neff*, 163 N. Y. 320, 57 N. E. 408, affirmed in 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905.

The taxation of the shares of stock in national banks, under Act April 1, 1869 (3 Gen. St. p. 3302), is substantially taxation of all the property of the banks, so that debtors of such banks, who have secured the debts by mortgaging their real estate, may properly claim to deduct the debts from the assessed value of the realty. *Myers v. Campbell*, 64 N. J. L. 186, 44 Atl. 863.

Real estate taken by a bank in payment of a debt, and that owned by it and necessary for its immediate accommodation, is a part of its capital stock, and therefore not subject to taxation as real estate, where the taxation of the capital stock is otherwise provided for. *State Bank v. Brackenridge (Ind.)*, 7 Blackf. 395.

27. Money on deposit not a "credit" from which debts of depositor may be

As to deduction of deposits from assets, moneys and credits of banks, see ante, "In General," § 329 (1da).

§ 329 (1de) Valuation of Surplus and Undivided Profits.—It has been held that under a statute requiring savings banks to pay a certain annual tax on the par value of its surplus and undivided earnings, the bonds and securities in which the surplus is invested must be appraised at their market value, whenever such value is less than the par value.²⁸

§ 329 (1df) Valuation of Shares—§ 329 (1dfa) In General.—It is the general rule that shares of bank stock should be assessed at their full and true market value,²⁹ and it is error to assess them at their par value,

deducted.—*Hagerty v. McNeill*, 7 O. C. C. 388, 4 O. C. D. 647.

Money deposited in a bank and evidenced by a certificate of deposit payable on demand is liable to assessment as money and not as a credit, under Revenue Laws 1903, p. 389, c. 73 (Cobbey's Ann. St. 1903, § 10,403). *White v. Lincoln*, 79 Neb. 153, 112 N. W. 369.

The various statutory provisions, construed together, make it apparent that money on deposit in a national bank, not drawing interest, is taxable to the depositor, without any deduction on account of debts due from him. *Gray v. Street Comm'rs*, 138 Mass. 414.

28. Appraisal of bonds and securities in which surplus invested.—Laws of New York, 1896, p. 859, c. 908, as amended by Laws 1901, p. 296, c. 117, requires every savings bank to pay to the state an annual tax of 1 per cent on the par value of its surplus and undivided earnings. Held that, in ascertaining the value of the surplus and undivided earnings for such purpose, the comptroller must appraise the bonds and securities on which the surplus is invested at their market value, whenever such value is less than the par value, in accordance with the provisions of Laws 1892, pp. 1900, 1901, c. 689, §§ 123, 124, authorizing savings banks to accumulate a surplus not to exceed fifteen per cent of their deposits, and providing that, in determining the per cent of surplus held by any savings bank, its interest-paying stocks and bonds shall not be estimated above their par value, or above their market value if below par. Order 84 App. Div. 168, 82 N. Y. S. 621, modified. *Bank v. Miller*, 177 N. Y. 461, 69 N. E. 1103.

The credit of a solvent debtor and interest-bearing securities are valued

for taxation at their face value. *State v. Clement Nat Bank (Vt.)*, 78 Atl. 944.

In absence of a contrary showing, land in which the surplus of a bank is invested is presumed equal in value to the amount invested therein for the purposes of taxation. *Smith v. Stephens*, 173 Ind. 564, 91 N. E. 167.

29. United States.—*People's Nat. Bank v. Marye*, 107 Fed. 570.

Maryland.—*Schley v. Montgomery County Comm'rs*, 106 Md. 407, 67 Atl. 250.

Mississippi.—*Bank v. Board*, 79 Miss. 152, 29 So. 825.

Missouri.—*Gracy v. Catron*, 118 Mo. 280, 24 S. W. 439; *St. Louis Bldg, etc., Ass'n v. Lightner*, 47 Mo. 393.

New Jersey.—*Stratton v. Collins*, 43 N. J. L. 562; *Lippincott v. Lippincott*, 74 N. J. L. (45 Vr.) 439, 66 Atl. 113; *Newark v. Tunis*, 81 N. J. L. (52 Vr.) 45, 78 Atl. 1066.

New York.—*People v. Assessors*, 2 Hun 583.

North Carolina.—*Pullen v. Corporation Comm.*, 152 N. C. 548, 68 S. E. 155.

Oregon.—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

Shares of stock in a banking corporation should not be assessed at their par value, but at their actual cash value. *Gracy v. Catron*, 118 Mo. 280, 24 S. W. 439.

Code Pub. Gen. Laws, art. 81, § 159, provides that the state tax commissioner shall make certain deductions from the aggregate value of all shares of banks, corporations, and joint stock companies, in determining the taxable value of stock, but does not state how the aggregate value shall be determined. Declaration of Rights, art. 15, requires taxation to be according to the actual worth of property. Held, that in determining the aggregate value of bank stock the state tax

when their actual or marked value is in excess of the par value.³⁰ Bank shares may be rated for taxation at more than would be produced by a dividend of the capital and surplus among all the shares, the bank's business and franchises being likewise entitled to consideration in fixing their real worth.³¹ United States bonds owned by a bank are property which tends to enhance the value of its capital stock, and are properly considered in determining the assessable value of its shares.³² Where, however, United States bonds owned by a bank are not considered in determining the assessable value of its shares, the omission can not be remedied by afterwards assessing them to the bank as omitted property.³³

commissioner may not add the amount of capital stock, surplus fund, and undivided profits, and deduct one-fourth of the total, but that he should take the market or intrinsic value, and make only such deductions therefrom as are reasonable on account of fluctuations and actual conditions. *Schley v. Montgomery County Comm'rs*, 106 Md. 407, 67 Atl. 250.

Rev. St., § 2762, requiring the shares of incorporated banks to be listed for taxation at their true value in money, is not in conflict with Rev. St. U. S., § 3701, providing that all stocks, treasury notes, and other United States obligations shall be exempt from state taxation. *Cleveland Trust Co. v. Lander*, 62 O. St. 266, 56 N. E. 1036, affirmed in 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394.

30. *People v. Assessors* (N. Y.), 2 Hun 583.

Under Code 1892, § 3764, providing that, for the purpose of taxation, bank stock shall be rated at par, unless it appears to be worth more or less, an assessment thereof for state and county taxes, based on a two-thirds estimate of the value, merely because property generally was assessed on that basis, is erroneous, and the city wherein such bank was located was not bound by such valuation, but, in estimating taxes due it from the bank, was entitled to assess its stock at par value. *Alexander v. Thomas*, 70 Miss. 517, 12 So. 708.

Where certain shares of stock of a bank, which are above par, have escaped taxation, they are subject to an assessment for back taxes computed according to the actual, and not the par, value of such stock. *Bank v. Lafayette*, 79 Miss. 152, 29 So. 825.

Certain bank stock having been assessed at its market value for state taxes, an ordinance imposing a tax

of 90 cents on every \$100 of the "assessed value" thereof was not objectionable on the grounds that such assessment was not on the market value of the stock, the assessment having been made on the assessed valuation for state taxes, as required by Const., art. 8, § 128 [Code, p. ccxliii]; and Code 1904, p. 495, § 1033h. *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

31. **Consideration of bank's business and franchises in valuing shares.**—*Stratton v. Collins*, 43 N. J. L. 562.

32. **Consideration of United States bonds owned by bank in valuing shares.**—*Security Sav. Bank v. Carroll*, 128 Iowa 230, 103 N. W. 379; *National State Bank v. Burlington*, 119 Iowa 696, 94 N. W. 234; *First Nat. Bank v. Independence*, 123 Iowa 482, 99 N. W. 142.

The general exemption of United States bonds from state taxation does not entitle a bank to deduct the amount of such bonds from the value of the shares of stock which are assessed to it for the purpose of taxation under Code, § 1322. *People's Sav. Bank v. Des Moines* (Iowa), 101 N. W. 867, reversed in 205 U. S. 503, 51 L. Ed. 901, 27 S. Ct. 571.

Though United States bonds as such can not be taxed, the shares of the capital stock of the corporation can be taxed at their true value if invested in such bonds; and where the officers of a bank furnish the assessor with the names of shareholders, together with the amount of stock held by each, their shares should be so assessed as to cover the value of their bonds, and it will be the duty of the officers to pay the tax in behalf of the shareholders. *St. Louis Bldg., etc., Ass'n v. Lightner*, 47 Mo. 393.

33. *Security Sav. Bank v. Carroll*, 128 Iowa 230, 103 N. W. 379.

Deduction of Indebtedness of Holders of Stock or Securities.—

In some jurisdictions it is held that the debts of an individual shareholder in a bank may not be deducted from his shares of stock;³⁴ but in others it has been held that in listing property for taxation, a stockholder in a state bank is entitled to have his share of the capital stock included in the sum of his credits from which his debts shall be deducted.³⁵

Deduction of Nontaxable Property or Property Otherwise Taxed.

—In ascertaining the true value of bank stock for the purpose of taxation, it is not requested in some jurisdictions, that the nontaxable property of the banks should be deducted from their assets,³⁶ and under the laws of New York where the assessors ascertain the value of the shares of bank stock from the total value of the corporate property, they must include the value of the real estate, and can not deduct it in making the assessment.³⁷ In other juris-

34. Deduction of debts of shareholders unauthorized.—Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346. Judgment affirmed in 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863.

Code, § 1309, provides that the term "credit" as used in the chapter providing for the deduction of debts from credits listed for taxation shall include every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title, bond, mortgage, or otherwise. Code, § 1308, being a substantial re-enactment of previous provisions on the subject, declares that all other property is subject to taxation in the manner prescribed, and that the section is intended to embrace "credits," including bank bills, government currency, and corporate shares of stock; corporate shares of stock being in all instances classified entirely separate from credits. Code, § 1360, required an assessment roll which should show the moneys and credits, but did not mention corporate shares of stock which had been previously required to be classified separately, and Code Supp. 1907, § 1360, again included corporate stock in the roll in addition to moneys and credits; the omission in the Code of 1897 evidently being an oversight. Held, that there was a definite legislative recognition of a distinction between the term "credits," as used in § 1309, and corporate shares or stocks are not "credits" within such section. *Morril v. Bentley*, 150 Iowa 677, 130 N. W. 734, modifying judgment on rehearing 126 N. W. 155.

An assessment of shares in a bank

is not subject to a deduction for the debts of the owner. *Williams v. Weaver*, 75 N. Y. 30.

A shareholder in a bank, who has been assessed on the value of his shares, pursuant to the Act of 1866 (Sess. Laws 1866, c. 761), can not claim from the assessors a reduction of the valuation on account of his debts; said act being a substitute for the then existing mode of taxing such property. *Cagger v. Dolan*, 36 N. Y. 59.

35. Deduction of shareholder's debts held proper.—*Bramel v. Manning*, 18 Wash. 421, 51 Pac. 1050.

In Connecticut a relation between a savings bank and its depositors is that of debtor and creditor, and therefore, in assessing for taxation shares of bank stock owned by a Connecticut savings bank in New York, the savings bank may set off against the value of such shares the amount of its liability to its depositors. *Bridgeport Sav. Bank v. Barker*, 17 Misc. Rep. 180, 40 N. Y. S. 1001, order affirmed in 154 N. Y. 128, 47 N. E. 973.

36. Deduction of nontaxable property not required.—*Mechanics' Nat. Bank v. Baker*, 65 N. J. L. 549, 48 Atl. 582, affirming 65 N. J. L. 113, 46 Atl. 586.

37. Value of real estate not to be deducted.—In re First Nat. Bank, 182 N. Y. 460, 75 N. E. 306, affirming order 107 App. Div. 624, 95 N. Y. S. 1128.

In determining the value of the bank stock to be assessed, the realty should be taken at its actual value. *Jenkins v. Neff*, 29 Misc. Rep. 59, 60 N. Y. S. 582, order affirmed. *Jenkins v. Neff*, 163 N. Y. 320, 57 N. E. 408; S. C., 186 U. S. 230, 46 L. Ed. 1140, 22 S. Ct. 905.

An assessor is required to assess the stock of a bank at its real value.

dictions, however, it is expressly provided that in making an assessment against the stock of a state or national bank against stockholders, the assessor is required to deduct from the total valuation of all the shares, not only the assessed valuation of the real property of the bank, but also the total value of all the nontaxable securities held by the bank.⁸⁸

and where a bank owns real estate of a greater value than that at which it is carried on the bank books, the excess should be considered in fixing the value of the stock. Judgment 110 N. W. 535, reversed on rehearing. First Nat. Bank *v.* Webster County, 77 Neb. 815, 113 N. W. 190.

38. Deduction of value of realty and all nontaxable securities.—Lippincott, *v.* Lippincott, 75 N. J. L. (46 Vr.) 795, 69 Atl. 502, reversing 66 Atl. 113.

P. L. 1905, p. 547, provides that in assessing bank stock the assessor shall allow all deductions and exemptions granted by law from the value of other taxable property owned by individuals in the state, and the assessment shall not be at a greater rate than is assessed on other moneyed capital in the hands of individuals, and in making such assessment the assessed valuation of the real property of such bank or banking association shall be deducted from the total valuation of the shares of stock assessed against the stockholders. Held, that in making an assessment against the stock of a state or national bank against stockholders, the assessor is required to deduct from the total valuation of all the shares not only the assessed valuation of the real property of the bank, but also the total value of all the nontaxable securities held by the bank. Order 66 Atl. 113, reversed. Lippincott *v.* Lippincott, 75 N. J. L. (46 Vr.) 795, 69 Atl. 502.

Burns' Ann. St. 1908, § 10,210, provides that the assessed value of realty owned by a bank shall be deducted from the valuation of the capital or capital stock of the bank. \$14,800 of the surplus of the bank was invested in realty, which was assessed at \$7,070, and the bank in its statement did not include the \$14,800 in the surplus. The board of review added that amount to the surplus, undivided profits, and capital stock, made an assessment of 80 per cent of the whole, and deducted from such 80 per cent the assessed value of the realty, leaving the remainder for taxation. Held, that the proper basis for assessment was the value of the capital, surplus, and undivided profits, not including any

amount represented in real estate, but that, where the value of real estate was not included by a bank in making its return, the bank was not entitled to a further deduction of the assessed value of the real estate. Smith *v.* Stephens, 173 Ind. 564, 91 N. E. 167.

Code, § 1322, provides that, to aid the assessor in fixing the value of bank shares, the corporations shall furnish a verified statement showing the amount of capital stock and the surplus and undivided earnings, and that the assessor shall fix the value of such stock, taking into account the capital, surplus, and undivided earnings, and in arriving at the value of such shares the amount of the capital invested in real estate shall be deducted, and the real estate assessed as other real estate, and that the property of such corporation shall not be otherwise assessed. Security Sav. Bank *v.* Carroll, 128 Iowa 230, 103 N. W. 379.

Under Gen. St., § 3836, as amended by Pub. Acts 1889, p. 36, providing that the shares of stock of any bank, trust, or insurance company owned by any resident of the state shall be set in his list at its market value in the town of his residence, but so much of such company's capital as may be invested in realty, on which it is taxed, shall be deducted from the market value of its stock in its return to the assessor, shareholders in such companies may be allowed a deduction from the market value of their stock for taxation in a town on account of the company's investments in realty, on which it is taxed. Appeal of Barrett, 73 Conn. 288, 47 Atl. 243.

Bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, though the capital of the bank be invested in North Carolina state bonds. Pullen *v.* Corporation, 152 N. C. 548, 68 S. E. 155.

A bank owning shares of stock of a corporation which has been assessed with its property, as prescribed by Code 1899, c. 29, § 77, as amended by Acts 1905, p. 317, c. 35, and having elected to have its capital stock and surplus assessed to it in conformity

Valuation by Assessor on Failure or Refusal of Owner.—Under a law requiring shares in banking associations to be rated for taxation, the valuation thereon may be made by the assessor if the owner fails or refuses to affix a taxable value to such property.³⁹ The jurisdiction of tax commissioners to assess a tax on bank stock is not affected by the existence of outside facts bearing on the proper measure of the deduction which were never called to their attention.⁴⁰

with § 79 of said chapter, as so amended, is entitled to have the value of such shares deducted together with the value of its real estate and exempt property, in determining the taxable value of its capital stock, surplus, and undivided profits. *Dillon v. Graybeal*, 60 W. Va. 357, 55 S. E. 398.

Acts 1902-04, p. 163, c. 148, § 17 (Code 1904, p. 2199), relative to taxation of bank stock provides that from the total market value of its shares of stock there shall be deducted the assessed value of its real estate otherwise taxed in the state and the value of each share of stock shall be its proportion of the remainder, provided that the market value of said stock shall be estimated at a sum not less than the aggregate of the capital, surplus, and undivided profits of the bank, as shown by its last published statement, after deducting from such aggregate the value of its real estate otherwise taxed in the state. Acts 1908, p. 325, c. 213, § 1, amending the previous act, provides that from the total value of the shares of stock of the bank, to be ascertained by adding its capital, surplus, and undivided profits, there shall be deducted "the value" of its real estate otherwise taxed in the state, and the actual value of such shares of stock shall be its proportion of the remainder. Held, that the value of real estate to be deducted is its assessed value, and not its actual value; the words "otherwise taxed" not referring merely to real estate, but referring to and modifying the entire phrase, "the value of its real estate otherwise taxed in this state." *Commonwealth v. Virginia Bank, etc., Co.*, 110 Va. 552, 66 S. E. 853.

To treat Acts 1908, p. 325, c. 213, § 1, amending Acts 1902-04, p. 163, c. 148, § 17 (Code 1904, p. 2199), relative to taxation of bank, as providing that from the value of the bank stock there shall be deducted the actual, rather than assessed, value of its real estate otherwise taxed in the estate, would render it of doubtful constitutionality, under Const. 1902, § 182

(Code 1904, p. cclxvi), providing that till otherwise provided by law bank stock shall be taxed in the manner provided by the law in force January 1, 1902; but from the total assessed value of the stock shall be deducted the assessed value of its real estate otherwise taxed in the state. *Commonwealth v. Virginia Bank, etc., Co.*, 110 Va. 552, 66 S. E. 853.

39. Valuation of bank shares by assessor where not made by owner.—*Dean v. Kopperl*, 1 Tex. App. Civ. Cases, § 746.

Code, § 1320, provides that any person acting as agent of another, and having in his possession personal property of such other, shall list the same for the taxation, and is made personally liable for the tax, and, if he refuse to render the list or swear to the same, the amount of such property may be listed and valued according to the best knowledge and judgment of the assessor. Section 1374 confers on the county treasurer the power to assess omitted property. Held that, where a county treasurer notified a taxpayer to appear and show cause why property held by him as an agent should not be assessed, as authorized by § 1316, and the taxpayer denied that he had any property in his control as agent, the treasurer had the same power to assess as is conferred on the regular assessor by Code § 1320. *Security Sav. Bank v. Carroll*, 131 Iowa 605, 109 N. W. 212.

40. Effect of facts bearing on measure of deduction unknown to commissioners.—*Citizens' Sav. Bank v. New York*, 166 N. Y. 594, 59 N. E. 1120, affirming 37 App. Div. 560, 56 N. Y. S. 295.

An assessment made under a law so far invalid as not permitting a set-off of the stockholder's indebtedness is not, therefore, invalid, unless the stockholder has shown the assessor what his just debts are, and taken the requisite steps to have his assessment made out accordingly. *Stanley v. Albanv*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234.

Sufficiency of Gross Assessment at Certain Percentage of Aggregate Capital Stock.—A gross assessment of the shares of stock of a bank at seventy-five per cent of the aggregate capital stock is not subject to the objection that it does not specify the value of each share where such valuation is ascertainable by simple computation by the auditor.⁴¹

§ 329 (1dfb) Valuation of National Bank Shares.—In General.—

While there is at least one early decision to the effect that national bank shares can not be included in the valuation for taxation by or under state authority at more than the par value thereof,⁴² and that the taxation of such shares above the par value is not merely an irregularity, but renders the whole tax inoperative and void,⁴³ yet it would now seem to be the well-established rule that the shares of stock of national banks may and should be assessed at their actual and not their par value.⁴⁴ As has been already seen, the

41. Sufficiency of gross assessment at certain percentage of aggregate capital stock.—*Citizens' Nat. Bank v. Klauss*, 47 Ind. App. 50, 93 N. E. 681.

42. Par value of national bank shares as fixed value for taxation.—*Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82.

43. *Union Nat. Bank v. Chicago*, Fed. Cas. No. 14,374, 3 Biss. 82.

44. Assessment of national bank shares at actual value.—*United States v. People v. Commissioners*, 94 U. S. 415, 24 L. Ed. 164; *Exchange Nat. Bank v. Miller*, 19 Fed. 372; *St. Louis Nat. Bank v. Papin*, Fed. Cas. No. 12,239, 4 Dill. 29.

Massachusetts.—*National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *Adams v. New Bedford*, 155 Mass. 317, 29 N. E. 532; *National Bank v. New Bedford*, 175 Mass. 257, 56 N. E. 288.

Nebraska.—*First Nat. Bank v. Webster County*, 77 Neb. 815, 113 N. W. 190, reversing judgment 110 N. W. 535.

New Jersey.—*Lippincott v. Lippincott*, 74 N. J. L. (45 Vr.) 439, 66 Atl. 113; *Newark v. Tunis*, 82 N. J. L. (43 Vr.) 461, 81 Atl. 722.

New York.—*Gallatin Nat. Bank v. Commissioners*, 67 N. Y. 516; *People v. Commissioners*, 8 Hun 536.

Oregon.—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

Pennsylvania.—*Appeal of Everitt*, 71 Pa. 216.

National bank stock is personal property, within B. & C. Comp., § 3058, directing that personal property shall be assessed for taxation at its true value in cash. *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

Under the constitution and laws of the state, and also under the law of

Congress authorizing taxation on shares in national banks, they may be taxed at their true money value. *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

Under B. & C. Comp., §§ 3042, 3058, declaring that shares of stock in banks shall be assessed at their value, and that personal property shall be assessed at its true value in cash, the cash value of shares of national bank stock, for the purpose of taxation, is their market value, and not their book value, as computed by adding to the par value of the paid-up stock the undivided earnings or profits of the bank. *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

National bank stock is to be appraised at its current value in the market where the bank is located. *Appeal of Everitt*, 71 Pa. 216.

For the purposes of taxation, national bank shares of stock are worth what their market value is at the time the assessment is made, and not what their value may be on the consummation of a contemplated closing of the bank's business, and division made among the shareholders. *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *Adams v. New Bedford*, 155 Mass. 317, 29 N. E. 532.

Tax Act 1903, § 2, provides that property not expressly exempted or excluded from the act shall be subject to annual taxation at its true value thereunder. Section 12 requires assessors to ascertain the true value of personal property. Held that, in taxing the shares of a national bank, the true value as the basis of the assessment is under ordinary conditions their exchangeable value in the market, and not their book or liquidation

provisions of the National Banking Act prohibit the taxation of national bank shares at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state.⁴⁵ The excess of the assets over the liabilities of a national bank at a stated time is of no importance in determining the fair cash value of its shares for the purposes of taxation, if there is sufficient evidence of a sum for which the shares could have been sold on that date.⁴⁶ In estimating the value of shares of stock in national as in state banks for the purpose of taxation, the value of United States bonds owned by the banks may be considered.⁴⁷

Deduction of Indebtedness.—With regard to the right of holders of national bank shares to deduct their bona fide debts from the assessed value of such shares of stock, the rule differs in the various jurisdictions. In some of the states it is held that the taxpayer is entitled to such deduction,⁴⁸

value. *Newark v. Tunis*, 81 N. J. L. (52 Vr.) 45, 78 Atl. 1066.

In assessing the shares of a national bank, the total valuation of all the shares at their true value is to be ascertained, and from this is to be deducted the assessments on real estate and such other items as the statute permits to be deducted, and each share is to be assessed on its pro rata of the balance. *Newark v. Tunis*, 81 N. J. L. (52 Vr.) 45, 78 Atl. 1066.

Act Mo. 1872, § 35 (Wag. St., c. 118), provides that in estimating the value for taxation of stock of certain corporations, including banks, the officer shall estimate and include all reserve funds, undivided profits, premiums, or earnings, and all other values, belonging to such corporation, which cash value shall be assessed and taxed as other personal property, and that private bankers shall make return of all moneys or values of any description invested in or used in their business, which shall be taxed as other personal property. Held, that this may be construed, with regard to national banks, as intended to impose a tax upon the shares only in such banks at their actual cash value, to be estimated by the taxing officers upon an inquiry, inter alia, into the value of the property of the banks, so far as it imparts a value to the shares. *St. Louis Nat. Bank v. Papin*, Fed. Cas. No. 12,239, 4 Dill. 29.

45. Provisions of United States Rev. Stat., § 5219, prohibiting discrimination in taxation of national bank shares.—See ante, "Prohibition of Discrimination between National Bank Shares and Other Moneyed Capital," § 326 (2bcb).

46. National Bank v. New Bedford, 175 Mass. 257, 56 N. E. 288.

47. Consideration of United States bonds owned by bank in valuing shares of stock.—*National State Bank v. Burlington*, 119 Iowa 696, 94 N. W. 234. See ante, "In General," § 329 (1dfa).

In assessing the value of shares in a national bank, the actual and not the par value is the standard to be adopted by the commissioners of taxation. Such valuation is not affected by the fact that a portion of the capital of the bank is invested in United States bonds, or by the fact that the bank is required by law to accumulate and retain a reserve. *People v. Commissioners* (N. Y.), 8 Hun 536.

48. Right of holder of stock to deduct his indebtedness.—*First Nat. Bank v. Washington County*, 17 Idaho 306, 105 Pac. 1053.

Shares of stock in national and state banks are "unsecured solvent debts" due from others to the taxpayer, from which he is entitled to deduct his unsecured debts due to bona fide residents of the state as authorized by Rev. Codes, §§ 1682, 1683, 1685. *First Nat. Bank v. Washington County*, 17 Idaho 306, 105 Pac. 1053.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing "that the discrimination in state taxation against national banks, where the laws of a state allow a taxpayer owning moneyed capital to make a deduction from the amount assessed against him of his bona fide indebtedness, no such provision being made for the indebtedness of holders of bank stock, they are entitled to such deduction, although they omitted to make demand therefor till after the return of the shares for assessment, and the session

and the excess only of the value of such stock over the amount of the owner's interest-bearing indebtedness is liable for taxation;⁴⁹ while in others, owners of shares in national banking associations are not entitled to deduct from the assessed valuation of the stock their bona fide indebtedness,⁵⁰

of the state board of equalization. *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, 8 S. Ct. 1121.

Under Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502], providing "that the shares of any national banking association owned by nonresidents of any state may be taxed where the bank is located," a nonresident shareholder, being compelled to pay the tax at such place, is entitled to all deductions from the value of his shares, on account of debts, that are allowed to resident shareholders. *Mercantile Nat. Bank v. Shields*, 59 Fed. 952.

The federal statute (Rev. St., § 5219 [U. S. Comp. St. 1901, p. 3502]) permits a state to authorize all shares held in national banks by any person to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." A state statute required assessors to assess to each taxpayer his real estate at its value, and his personal estate at its full value after deducting debts owed by him, and provided that if, before the completion of the assessment, he makes affidavit "that the value of the personal estate owned by him, after deducting his just debts and his property invested in the stock of any corporation liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more;" and a statute subsequently passed, relating to the taxation of bank shares, made no provision for deducting debts. Held, that under such statutes the assessors were not without authority to assess national bank shares, and, where no debts existed to be deducted, the assessment was valid, and the tax paid was a valid tax, but, where there did exist such indebtedness which ought to be deducted, the assessment was voidable, but not void, the assessors being authorized in such cases, until notified in some proper manner that the shareholder owed debts which he

was entitled to have deducted. *Supervisors v. Stanley*, 12 Fed. 82.

Code 1873, § 814, provides that "in making up the amount of money or credits which any person is required to list, or have listed or assessed, he will be entitled to deduct from the gross amount all debts in good faith owing by him." Section 802 provides that the term "credit," as there used, includes "every claim and demand for money, labor, or other valuable thing," and all "money or property of any kind secured by deed, mortgage, or otherwise." Held, that in assessing national bank stock the holder thereof is entitled to deduct from its cash value the amount of his debts. *First Nat. Bank v. Albia*, 86 Iowa 28, 52 N. W. 334.

The value of stock in a national bank, owned by a taxpayer, must be considered a part of the "debts due or to become due" him from which he is entitled to deduct the amount of his bona fide and unconditional indebtedness, in listing his property for taxation, under Rev. St., § 1038, subd. 10. *Ruggles v. Fond du Lac*, 53 Wis. 436, 10 N. W. 565.

49. *Stanley v. Albany*, 121 U. S. 535, 30 L. Ed. 1000, 7 S. Ct. 1234; *Richards v. Rock Rapids*, 31 Fed. 505; *Peavey v. Greenfield*, 64 N. H. 284, 9 Atl. 722; *McAden v. Mecklenburg*, 97 N. C. 355, 2 S. E. 670.

The rule that the excess only of the value of bank stock over the amount of the interest-bearing indebtedness for which it is pledged is taxable applies to nonresidents. *Farmington v. Downing*, 67 N. H. 441, 30 Atl. 345.

Under Gen. Laws, c. 53, § 6, providing that the assessment of taxes on money at interest shall be only for the amount in excess of money on which the person whose money is assessed pays interest, national bank stock is to be reckoned as money at interest. *Weston v. Manchester*, 62 N. H. 574.

50. **Deduction of bona fide indebtedness from valuation of bank stock not allowed.**—*Indiana*—*First Nat. Bank v. Turner*, 154 Ind. 456, 57 N. E. 110.

Ohio.—*Chapman v. First Nat. Bank*, 56 O. St. 310, 47 N. E. 54.

Texas.—*Primm v. Fort*, 23 Tex. Civ.

unless, as has been held in some jurisdictions, the owner of such stock has

App. 605, 57 S. W. 86, rehearing denied 57 S. W. 972.

Virginia.—*Burrows v. Smith*, 95 Va. 694, 29 S. E. 674.

National bank shares belong to the class of property known as "stocks," and not to the class known as "credits," within Rev. St., § 2730, relating to taxation, and hence the holders thereof have no right to deduct their debts from the assessed value of such shares. *Chapman v. First Nat. Bank*, 56 O. St. 310, 47 N. E. 54. And see *Niles v. Shaw*, 50 O. St. 370, 34 N. E. 162.

See, however, *State Nat. Bank v. Shields*, 1 O. Dec. 609, 31 Wkly. L. Bull. 321, in which it is held that in determining the value of national bank shares for taxation, under Rev. St. U. S., § 5219 [U. S. Comp. St. 1901, p. 3502], owners of shares in national banks can deduct bona fide debts from the value of such shares, as provided in Rev. St., § 2730, for ascertaining "credits" for taxation.

Gen. St. 1889, par. 6851, provides that, for the purpose of taxation, the taxpayer may deduct from the gross amount of his credits the debts owing by him. Held, that "credits," as used in the act, and defined (paragraph 6847) to "include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate," does not include national bank stock, and the owners of such stock can not deduct from its assessed value the amount of their debts. *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440, 36 Pac. 719.

Section 5219, Rev. St. U. S., provides that shares of stock in a national bank shall not be taxed by any state at a greater rate than is assessed on other moneyed capital in the hands of individuals of such state. Section 1, art. 10, Const., prescribes that the assembly shall provide by law for a uniform rate of taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property. Sections 6328, 6329, *Horne's Rev. St.* 1897, provide that for purposes of taxation the shares of stock in a bank shall be valued by deducting the bona fide indebtedness of the bank from its credits and the value of its assets. Tax Law 1891, as amended in 1899, § 63 (Acts 1899, p. 493), provides that the individual taxpayer may, for the purposes of taxation, deduct his bona

fide indebtedness from his credits. Held, that owners of shares in a national banking association are not entitled to deduct from the assessed valuation of the stock their bona fide indebtedness. *First Nat. Bank v. Turner*, 154 Ind. 456, 57 N. E. 110.

"Stocks" are not "credits," within the meaning of Const., art. 13, § 3, and legislation thereunder, and the law does not authorize the deduction of the debts of the individual shareholder in a bank from his shares of stock. *Commercial Nat. Bank v. Chambers*, 21 Utah, 324, 61 Pac. 560, 56 L. R. A. 346, judgment affirmed in 182 U. S. 556, 45 L. Ed. 1227, 21 S. Ct. 863.

Rev. St., art. 5063, authorizes taxpayers to deduct the amount of their indebtedness from their taxable credits; and Rev. St. U. S., § 5219, provides that national bank shares shall not be assessed at a greater rate than other moneyed capital in the hands of individual citizens of any state. Held, that a taxpayer, having no credits against which his indebtedness might be set off, was not entitled to set off such indebtedness against the assessed value of his national bank shares, in the absence of proof that a relatively large sum of moneyed capital obtained exemption under § 5063 which was employed in competition with the capital of national banks, and that such amount belongs to natural persons, and not to corporations. *Primm v. Fort*, 23 Tex. Civ. App. 605, 57 S. W. 86, rehearing denied in 57 S. W. 972.

Rev. St., art. 5063, permitting the taxpayer to deduct his indebtedness from his credits, being based on public policy, and not intended as nor resulting in unfriendly discrimination against investments in national banks, and in view of the advantages enjoyed by capital invested in such corporations, the owners of national bank stock are not entitled to deduct their indebtedness from the value of their stock for the purposes of taxation. *Primm v. Fort*, 23 Tex. Civ. App. 605, 57 S. W. 86, rehearing denied in 57 S. W. 972.

Acts 1889-90, p. 197, § 8, subd. 1, provides that each person shall exhibit to the commissioners a statement in the aggregate of all bonds, notes, and other evidences of debt due such person in excess of \$100, and that there shall be deducted from the aggregate amount thereof all such bonds, demands, or claims, not otherwise de-

no other credits from which a deduction of his bona fide debts may be made.⁵¹

Deduction of Property Exempt or Otherwise Taxed.—The allowance of deduction of property exempt or otherwise taxed in assessing shares of national bank stock depends upon the statutes in the various jurisdiction.⁵²

ducted, owing to others from such person as principal debtor. Held, that one who owns national bank stock is not entitled to have his indebtedness deducted from the value of such stock before it is assessed for taxation. *Burrows v. Smith*, 95 Va. 694, 29 S. E. 674.

Before a state statute denying all right in taxation to deduct debts from the stock in national banks assessed with taxes, but allowing deduction from other investments, can be held a violation of Rev. St. U. S., § 5219 (U. S. Comp. St. 1901, p. 3502), prohibiting a state from taxing such stock at a greater rate than is assessed on other moneyed capital, it must appear that such other moneyed capital exists in such an amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with National Banks. *West Virginia Nat. Bank v. Dunkle*, 65 W. Va. 210, 64 S. E. 531.

51. Propriety of deduction where stockholder has no other credits.—*Indianapolis v. Vajen*, 111 Ind. 240, 12 N. E. 311.

In the assessment and taxation of shares of national bank stock, the owners thereof, having no other credits or moneyed capital, are entitled to deduct their bona fide debts from the assessed value of such shares of stock. *Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97.

52. Allowance of deductions and exemptions in assessing shares of bank stock.—The validity of a state statute providing for the taxation of national bank stock is not affected by the fact that it does not provide for any deduction from the valuation on account of any United States bonds held by the bank. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

The owner of bank stock is not entitled to a deduction in valuation thereof for taxation on account of any capital surplus, or undivided profits of the bank, being deposited in banks without the state. *First Nat. Bank v. Washington County*, 17 Idaho 306, 105 Pac. 1053.

A statute imposing taxes on bank

shares is not invalid because it requires the assessment of such shares at their market value, without making any deduction on account of the real estate owned by the bank, which is separately taxable; the shares being the property of the stockholder, while the real estate is the property of the corporation. *People's Nat. Bank v. Marve*, 107 Fed. 570. Modified and affirmed in 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

The surplus fund which a national bank is required to reserve from its net profits is not excluded from the valuation of its shares for taxation. *Stratford Nat. Bank v. Dover*, 58 N. H. 316.

The provision of Pol. Code Cal., § 3609, relating to the assessment and taxation of national bank shares, that in making assessment to each stockholder there shall be deducted from the value of his shares "such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank," is valid and enforceable, when construed in harmony with the other parts of the section and the express declaration therein that such shares shall not be taxed at a greater rate than other moneyed capital in the hands of individual citizens of the state; its purpose being to require the deduction from the total value of the bank stock, not only of the value of its real estate, which is taxable to the bank, but also of the value of all other property owned by the bank which would be exempt from taxation, under the laws of the state, in the hands of owners of other moneyed capital, and to thus fix the basis for the value of shares in the hands of the stockholders. *Nevada Nat. Bank v. Dodge*, 56 C. C. A. 145 119 Fed. 57.

The New Jersey Tax Act 1903, § 17, relating to the taxation of national bank stock as modified by Act 1905 (P. L. p. 457), provides that, in assessing shares of stock of banks, the assessors shall allow all deductions and exemptions granted by law from the

§ 329 (1e) Amendment or Alteration.—Since Ohio Rev. St., §§ 2781, 2782, relating to the duties of the county auditor when any person makes a false tax return or a false statement of his personalty, subject to taxation, or the assessor has omitted or made an erroneous return, and authorizing him to correct such return, and to charge such person on the duplicate with the proper amount of taxes, apply only to persons required to make returns of their property for taxation; and the stock of a shareholder in a bank being returnable by the cashier, though the indebtedness of a stockholder has been erroneously deducted from the value of his shares by the county auditor, such deduction can not be placed on the duplicate as an omission, and the taxes collected thereon.⁵³ Under the Iowa Code, §§ 1322, 1324, providing that capital stock of savings banks is to be assessed to the bank on the basis of the actual value of the stock, and showing that it is not contemplated that any further assessment shall be made for money and credits, and § 1374, as supplemented by Acts 20th Gen. Assem., p. 33, c. 50, providing that the treasurer shall make assessments when property subject to taxation has been, from any cause, not listed and assessed, the county treasurer has no authority to add to the assessment of a savings bank a certain sum as “money and credits” intended to represent the difference between the assessment of capital stock as made by the assessor and the par value of the capital stock.⁵⁴

§ 329 (1f) Additional or Supplemental Assessment.—Provision is usually made by the statutes of the various states for an additional or supplemental assessment of bank property or shares of bank stock which have been omitted from taxation, and the manner in which such additional or supplemental assessment shall be made is prescribed.⁵⁵ To sustain the

value of other taxable property owned by individuals in the state. *Newark v. Tunis*, 81 N. J. L. (52 Vr.) 45, 78 Atl. 1066.

Though the deposits of a savings bank are exempt from taxation, its assets can not be entirely disregarded on an assessment for taxation of the stock of a national bank owned by it; and the savings bank is not entitled to set off the entire amount of its liabilities against the stock so held. *People v. Coleman*, 63 Hun 633, 18 N. Y. S. 675, 45 N. Y. St. Rep. 136.

53. Amendment or alteration.—*State v. Akins*, 63 O. St. 182, 57 N. E. 1094. Rev. St. Ohio, § 2781a, enacted March 22, 1900, and which is supplementary to the original § 2781, under the decisions of the state supreme court construing the original and cognate sections, does not authorize a county auditor to place upon the duplicate tax list sums which have been allowed as deductions from the valuation of national bank stock in previous

years on account of the indebtedness of the stockholders, as property omitted from taxation or not taxed according to its true value, although such deductions were not authorized by law. *Judgment, Mercantile Nat. Bank v. Lander*, 109 Fed. 21, affirmed. *Lander v. Mercantile Nat. Bank*, 55 C. C. A. 523, 118 Fed. 785.

54. *German Sav. Bank v. Trowbridge*, 124 Iowa 514, 100 N. W. 333.

55. Statutory provisions for supplemental or additional assessment of omitted property.—Act March 21, 1900 (Acts 1900, p. 65, c. 23), provides for the taxation of shares of stock in national banks, and makes the bank liable for payment of the tax, etc. *Ky. St. 1903, § 4241*, provides that property omitted from taxation in any year or years shall thereafter be listed for taxation as omitted. Held, that limitations began to run against an assessment of shares under § 4241 from the time when the shares might have been assessed otherwise than un-

validity of a supplemental assessment, it must appear that the items of property assessed were not assessed in the original assessment, and that they

der the Act of 1900, since that statute created no new right to tax the shares, but simply gave a new remedy. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed in *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Ky. St. 1903, § 4241, providing that it shall be the duty of the sheriff to cause to be listed for taxation all property omitted by the assessor for any year or years, authorizes the sheriff to list shares of bank stock which had been omitted. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, appeal dismissed in *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Act March 21, 1900, p. 66, c. 23, § 3, providing that, when any shares of stock of a national bank have not been listed for taxation for state, county, or municipal purposes under levy or levies for any year or years since 1892, it shall be the duty of the president and cashier to list the same for taxation under levy or levies for the years omitted, authorizes a retrospective assessment and collection of taxes for municipal purposes. *London v. Hope*, 26 Ky. L. Rep. 112, 80 S. W. 817.

Notice or demand.—Ky. St. 1903, § 4241, provides that property omitted from taxation in any year or years shall thereafter be listed for taxation as omitted, and provides that the summons in such proceedings shall be issued and delivered to the owner if in the county, and if not, then to his agent. Act March 21, 1900 (Acts 1900, p. 65, c. 23), relative to the taxation of shares of national banks, makes the bank liable for payment of the tax. Held that, on proceedings under § 4241, to have shares of stock in a national bank taxed as omitted property, notice to the bank is notice to the agent of the shareholders within the meaning of such section. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed in *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Code, § 1322, provides that shares of stock in national banks shall be assessed to the stockholders at the place where the bank is located. Section 1374 as amended by Acts 28th Gen. Assem., p. 33, c. 50, provides that, when property subject to taxation is

omitted, the county treasurer shall make demand of the person by whom it should have been listed of the amount the property should have been taxed in the years it was omitted. The auditor and treasurer of a county gave notice to the stockholders of a national bank that they were the owners of stock omitted from taxation for preceding years, and required them to show cause on a specified day why the same should not be assessed against them. On the day fixed the tax ferret appeared before the officers and informed them of the omitted property. There was no assessment of the stock by the officers. Held, that there was no assessment on which to base an action for taxes on property omitted from taxation for preceding years. *Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605.

Parties.—The president and cashier of the bank were properly made defendants in such proceedings, it being their duty under the statute to list the stock for taxation. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed in *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Statement containing description and value of omitted property.—Ky. St. 1899, § 4052, provides that the person owning or possessing property on September 15th shall list it with the assessor, and § 4241 requires the auditor's agent to cause property omitted to be listed, and to file in the clerk's office a statement containing a description and value of such property. Held, that a statement designating property sought to be taxed as "money, notes, bonds, mortgages, certificates, and national bank stock," etc., sufficiently described it. *Commonwealth v. Riley*, 115 Ky. 140, 24 Ky. L. Rep. 2005, 72 S. W. 809.

The original statement of a revenue agent in a proceeding against a national bank to assess omitted property alleged that the capital stock of the bank consisted of 500 shares of the par value of \$100 each, that there was a surplus and undivided profits amounting to over \$16,000, and that the property, except \$30,000, was omitted from taxation for a year. An amended statement alleged that the value of the 500 shares of stock was \$50,000; that there was a surplus of \$13,000 and over \$3,000 in undivided

were omitted by mistake.⁵⁶ If the assessors have once assessed an item of property, that assessment can not be revised by supplemental assessment.⁵⁷ Thus, it has been held that an assessment of back taxation on the surplus of a bank on which taxes have been levied and paid is unauthorized, though such surplus has been taxed at an undervaluation.⁵⁸ Where an assessor in assessing the stock of a national bank exempted therefrom the amount of the bonds of United States and all municipal corporations, owned by the bank,

profits; that all of the shares of stock except 270 shares, were omitted from taxation for that year, leaving unassessed 230 shares and their proportionate part of the surplus and undivided profits. Held, that the original and amended statements failed to show that the valuation fixed on which taxes were paid was not sufficient to cover everything that the bank had that was taxable, for the valuation of nontaxable securities may have been deducted from such valuation. *Commonwealth v. Mt. Sterling Nat. Bank*, 30 Ky. L. Rep. 954, 99 S. W. 958.

Scope of proceedings.—In such proceedings the bank was not in position to raise the question of want of notice to the shareholders. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed, *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

The bank could not raise the question that some of the shares might have changed hands. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed in *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

Procedure to obtain order for inspection of books by inspector.—Acts 1901, p. 109, c. 71, authorizes an order for the inspection by the assessor of a person's books to determine whether another has listed his property for taxation. The affidavit by a county assessor alleged that he believed that a third person had omitted from his tax returns money, drafts, checks, certificates, and memoranda held by him, and that a bank had under its control cash and draft registers, the personal account of the third person, and drafts, checks, and receipts, drawn by or payable to him, which contained evidence showing his omission to list taxable property. The court issued a writ directing the bank to permit the assessor to inspect its cash and draft registers, personal account, and deposit certificates, so far as to show the account of the third person. Held,

that the writ was not broader than the affidavit. *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N. E. 53.

The affidavit by a county assessor to obtain, as authorized by Acts 1901, p. 109, c. 71, a writ requiring a bank to permit the assessor to inspect its books to determine whether a third person had omitted to list property for taxation, which alleged that the bank had in its possession cash and draft registers, the personal account of the business of the third person, and drafts, checks, and receipts, drawn by or payable to the third person, which books and papers contained evidence showing the failure of the third person to list property for taxation, sufficiently described the books and papers sought to be inspected to warrant the issuance of a writ therefor. *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N. E. 53.

Where a county assessor files an affidavit under Act March 6, 1891, § 34, relative to taxation, as amended by Act March 5, 1901 (Acts 1901, p. 109), stating that he believes a bank has in its possession papers showing an unlawful omission by it to return property for taxation, and thereon an order is entered awarding to him a writ against the bank to permit him to inspect the property, whereupon the bank appears, and files a petition to amend the order and dismiss the proceedings, the assessor is a party to the judgment denying the petition, and must be made a party to the appeal therefrom by the bank. *Daily v. Washington Nat. Bank*, 163 Ind. 476, 72 N. E. 260.

56. Items must be omitted from original assessment by mistake.—*Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

57. Assessment once made not revisable by supplemental assessment.—*Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

58. Undervaluation as authorizing assessment of back taxation on bank surplus.—*Bank v. Board*, 79 Miss. 152, 29 So. 825.

the county authorities have no right to assess the stock of omitted property on the theory that the bonds were not exempt from taxation.⁵⁹ In determining what was assessed in the original assessment, the court is controlled by the assessment itself.⁶⁰ That can not be modified or limited by evidence aliunde.⁶¹ Assessors can not cure an error in the amount of an assessment of money at interest by securing a revaluation thereof through a supplemental assessment, even though their error arose from their ignorance of the specific kinds of securities in which the money at interest was invested.⁶² A supplemental assessment may be laid on property omitted by mistake in the original assessment, even though it may result in raising more money than was voted to be raised.⁶³ A supplemental assessment is a part of the original and, an amendment of it,⁶⁴ and must be made to the same person as the original assessment was properly made to.⁶⁵ Under an act requiring the taxation of capital stock in national banks, an assessment of such stock which has been omitted by the county auditor when he delivered the tax duplicate to the treasurer should be inserted by the latter, but, if correct assessments be made by the auditor after such delivery and acted upon by the treasurer, it is sufficient.⁶⁶

§ 329 (1g) Notice of Assessment.—It would seem that stockholders of a national bank are required to take notice of the law of the state providing for the assessment and taxation of their shares, and of the general law creating a board of equalization and fixing the time and place where they may appear for the purpose of applying for a reduction of their assessments,⁶⁷ and a notice required to be given to the bank of the assessment of

59. Taxation of bonds previously omitted as exempt.—*Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605.

60. Original assessment conclusive as determining what was assessed.—*Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

61. *Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

62. *Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

63. *Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

64. Assessment a part of the original, and to be made to same person.—*Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

65. *Sweetsir v. Chandler*, 98 Me. 145, 56 Atl. 584.

66. *Strader v. Manville*, 33 Ind. 111.

67. Notice of assessment of bank shares—Duty of stockholders to take notice of state law.—*Nevada Nat. Bank v. Dodge*, 56 C. C. A. 145, 119 Fed. 57.

In *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236,

17 S. Ct. 829, in which it was objected that there was a lack of due process of law, in that the property of the shareholders of the bank was subjected to an ad valorem tax without an opportunity being given to them to be heard as to the value, court held that: "It is true the statute contemplates no personal notice to the shareholders, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always in the absence of express provision to the contrary, to be heard at the office of the official charged with the duties; *Andes v. Ely*, 158 U. S. 312, 323; and a notice to all property holders of the time and place in which the assessment is to be made is all that 'due process,' requires in respect to the matter of notice in tax proceedings."

the shares of the respective stockholders is sufficient notice to the stockholders, in connection with such statutory provisions.⁶⁸ Chapter 409, § 312, of the laws of New York of 1882, relating to taxation of shares of national banks, requires notice in writing of the assessment of the capital stock served on the bank within ten days. Section 314 provides that the tax imposed on the shares owned by nonresidents shall be a lien thereon, and § 315 makes it the duty of the bank officers to retain so much of the dividends belonging to such stockholder as shall be necessary to pay the tax. It has been held that the requirement of notice of assessment is for the purpose of creating a lien on the shares of nonresident stockholders, and that the tax may be assessed on the shares of resident stockholders without such notice in the same manner as on personal property.⁶⁹

§ 329 (2) Assessment Rolls or Books.—Nature and Necessity.—

In assessing bank property or bank shares for taxation, an assessment roll or book prepared in the manner prescribed for the assessment of property generally is essential, and such bank property or shares are not assessed, though in a verified list, until set down in the assessment roll as required by statute.⁷⁰ The list made by the assessor, and not the list returned by the individual taxpayer, constitutes the assessment roll.⁷¹

Requisites and Sufficiency.—As in the case of assessments generally, the assessment roll where the property or shares of a bank are sought to be taxed must designate the owner or person to whom the property is sought to be assessed,⁷² and a description of the property on which the assessment

68. Sufficiency of notice to bank as notice to stockholders.—*Nevada Nat. Bank v. Dodge*, 56 C. C. A. 145, 119 Fed. 57.

69. Construction of New York statute relating to taxation of national bank shares.—*Chamberlain v. Smith*, 50 Hun 39, 2 N. Y. S. 460.

70. Nature and necessity for assessment rolls or books.—*Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

71. List made by assessor constitutes assessment roll.—*Vicksburg Bank v. Adams*, 74 Miss. 179, 21 So. 401.

72. Designation by person or corporation to whom property sought to be assessed.—**Names of shareholders.**—Failure of the assessors to place the names of the shareholders in a national bank, who were sought to be taxed, upon the assessment roll, in accordance with the requirement of the state statute, renders such tax illegal and void, although a separate list, with the knowledge of the shareholders, was kept by such assessors, showing the names of all such shareholders, with the number of shares held by each, and the assessable value of all such

shares. *Albany City Nat. Bank v. Maher*, 6 Fed. 417, 19 Blatchf. 175.

It is no ground for annulling an assessment on shares of bank stock under Acts 1890, No. 106, § 27, that the list of shareholders appears in a different part of the assessment book from where the amount is noted. *Castles v. New Orleans*, 46 La. Ann. 542, 15 So. 199.

Where bank stock has been assessed by the proper officer, the fact that the assessment is entered upon the tax duplicate in the name of the bank, instead of the individual stockholders, does not invalidate the lien, or relieve the stockholders from liability for the tax. *Small v. Lawrenceburgh*, 128 Ind. 231, 27 N. E. 500.

Under Code, § 1383, as originally enacted and as amended by Acts 30th Gen. Assem. (Laws 1904, p. 43, c. 50), providing that taxes shall be formed into a single tax, etc., and entered on the tax list in a single column as a consolidated tax, etc., and § 1387, providing that no informality in the tax list shall affect the validity of any taxes, etc., the mere fact that an auditor entered on the tax list the names of the owners of realty or personalty

is made.⁷³ An assessment of bank stock need not, however, show on the face of the assessment list that the stock is not exempt from taxation.⁷⁴ A bank tax for "money on hand, at interest or on deposit," will not be abated, on appeal, for the assessor's omission of the statute's words, "surplus

in alphabetical order, and omitted therefrom the name of an owner under the proper letter, does not invalidate the lien of personal property taxes, and the fact that the tax list showed the name of "W. E. Brown" in the column of names beginning with "B" with personal taxes opposite his name, and then showed in the column of names beginning with "F" the name "First National Bank," followed by the word "stockholders," followed by the names of divers persons including "W. E. Brown," together with the entry of taxes opposite their respective names, did not invalidate the lien of personal taxes. *Watkins v. Couch*, 142 Iowa 164, 120 N. W. 485.

Misnomer of corporation.—On an assessment of bank stock under 1 Hill's Code Wash., §§ 1038-1040, making banks agents for their respective shareholders, and authorizing the collection from each bank of taxes on its stock assessed against it as such agent, if the statute is not complied with by charging the bank on the assessment roll, and it is not even referred to by its proper corporate name in the assessments against its shareholders, the warrant to the collector conferred no authority to seize the property of the bank for the purpose of enforcing payment of taxes charged against shareholders. *First Nat. Bank v. Hungate*, 62 Fed. 548.

Assessment held to be to one as agent or trustee.—An assessment to plaintiff, "Escrow money in Merchants' National Bank, \$55,000," is in effect to him as agent or trustee of parties unknown to the assessor, as is proper under Pol. Code, § 3628; plaintiff not having in his statement to the assessor disclosed the facts as to the money, as under § 3629 he should have done, so as to enable the assessment to be made under § 3639 to plaintiff as agent or trustee of the various persons interested in the money. *Title Guarantee, etc., Co. v. Los Angeles County*, 2 Cal. App. 619, 86 Pac. 844.

Assessment held valid as against executor.—Entry of an assessment of property of the Daniel Sullivan estate to "Hibernian Banking Association, Exr.," indexed under "S," and reciting: "Hibernian Banking Association, Exr. Sullivan, Daniel, Est. \$40,000"—

was not objectionable on the theory that it was not an assessment against the executor. *People v. Hibernian Banking Ass'n*, 245 Ill. 522, 92 N. E. 305.

The assessment of land in the name of another than the owner does not make it or the tax sale thereon invalid. *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 174, 91 Pac. 750.

73. Description of property.—The term "loans on stocks and bonds," used in describing an item of property assessed to a savings bank, sufficiently describes the property. *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356, 63 Pac. 665.

Under Rev. St. 1898, § 1044, providing that bank stock shall be entered for taxation in the names of the holders of the several shares thereof, respectively, the fact that a board of review's resolution provides for the assessment of the "capital stock" of a bank partnership, while the assessment, as entered, describes the property as "capital," is immaterial. *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

Entry of items in assessing omitted property.—Since, under Code, §§ 1305, 1312, 1322, 1352, and 1360, relating to the assessment of property for taxation, requiring shares of stock of national banks to be assessed to the stockholders at the place where the bank is located, requiring the assessor to enter on the assessment rolls the several items of property required to be entered for assessment, etc., an assessor in listing property is required to list to each stockholder of a bank the value of the shares of stock held by him, a county treasurer or county auditor attempting to assess omitted property consisting of bank stock must list the same as an assessor would, and notices given to the stockholders of a bank notifying them that they were the owners of stock in a bank and requiring them to show cause why the same should not be assessed, and demanding payment of the amount said property should have been taxed in the years it was not assessed, is not a sufficient assessment. *Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605.

74. Necessity for showing that property is taxable.—*Monroe v. New Canaan*, 43 Conn. 309.

capital.⁷⁵ Where whatever personal property which was held by the stockholders of a bank, who resided in the town where the bank was situated, was valued and taxed to them in the same "duplicate" with the assessment and valuation of the bank stock, although carried out in a distinct line, it was held that there was a sufficient compliance with the statutory requirement as to including the valuation of the stock in that of the personal property.⁷⁶ So, also, this requirement has been held to be substantially complied with, where, in making up their assessment roll, the assessors place the valuation of bank shares in a separate item in the column in which the personal property is placed.⁷⁷ The entry of assessments for national bank shares upon a list or a book separate from other assessments of personal property against individuals does not render it void.⁷⁸

Extending Amount of Tax.—The omission of the city clerk to extend upon the assessment roll the amount to be paid by each holder of bank shares, until after such roll has been delivered to the city treasurer, does not render the taxation of such shares void.⁷⁹

§ 329 (3) Equalization of Assessments.—By Whom Made.—The equalization of assessments among the different counties of a state or territory is to be made by the state or territorial board of equalization.⁸⁰ County commissioners or supervisors usually constitute boards of equalization for their counties, whose duty it is to equalize the valuation of the taxable property in their respective counties under such rules as may be prescribed by law.⁸¹

75. Effect of omission of statutory words "surplus capital."—First Nat. Bank v. Concord, 59 N. H. 75.

76. Sufficient compliance with requirement to include valuation of stock in that of personality.—Farmers' Nat. Bank v. Cook, 32 N. J. L. 347.

77. Williams v. Weaver, 75 N. Y. 30.

78. Entry of assessment for national bank shares upon separate list or book.—McMahon v. Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796.

79. Extending amount of tax.—First Nat. Bank v. Waters, 7 Fed. 152, 19 Blatchf. 242.

Where the county board of review fixes 70 per cent of the aggregate capital stock, surplus and undivided profits of a bank as the true cash value of the stock, less the assessed valuation of the real estate, but does not expressly value each share, the auditor may subsequently extend on the tax duplicate the amount of the taxes assessed to each individual stockholder under Burn's Ann. St. 1908, § 10,316, providing that the auditor shall from time to time correct all errors, which he may discover in his duplicate, either in the name of the

person assessed, the description of the property or the amount charged. Citizens' Nat. Bank v. Klauss, 47 Ind. App. 50, 93 N. E. 681.

80. Equalization by state or territorial board of equalization.—Territory v. First Nat. Bank, 10 N. Mex. 283, 65 Pac. 172; Hacker v. Howe, 72 Neb. 385, 101 N. W. 255.

The fact that an individual taxpayer of a county has returned for assessment money on hand and in bank at its full value will not prevent the state board from equalizing the assessment by raising the aggregate value of all property in such county the per centum found necessary to bring it to a uniform standard with all property of the different counties of the state. Hacker v. Howe, 72 Neb. 385, 101 N. W. 255.

81. Equalization by county boards of equalization.—Weiser Nat. Bank v. Jeffreys, 14 Idaho 659, 95 Pac. 23; Cassett v. Sherwood, 42 Iowa 623; Geneva v. Board, 50 Misc. Rep. 63, 100 N. Y. S. 330, affirmed in 114 App. Div. 915, 100 N. Y. Supp. 1158, which was reversed 188 N. Y. 1, 80 N. E. 381.

The board of supervisors ordered

Powers of Board.—The jurisdiction of boards of equalization being special, acts not authorized by the express terms of the statute are without validity.⁸² Under a statute requiring the territorial board of equalization of taxes to meet annually, and declare that it shall be the duty of the auditor of the territory at such meeting to furnish the board with the assessment roll

that shares of bank stock be assessed at 60 per cent of the par value of the stock, and they were so returned by the assessor; but the township trustees, acting as a board of equalization for the township, reduced the assessment to 40 per cent of the par value, whereupon the board of supervisors restored the assessment to the rate it had first ordered. Held that, while the township trustees are empowered to equalize the taxes of their township, yet the board of supervisors are charged with the duty of equalizing the taxation of the county, and accordingly may fix the rate of assessment in the townships. *Cassett v. Sherwood*, 42 Iowa 623.

Where the supervisors of a county improperly assess the shares of bank stock in a certain city other than in the manner provided by Laws 1896, p. 806, c. 908, § 24, as amended by Laws 1901, p. 1350, c. 550, whereby the tax of said city is increased, the city is not deprived of its right to have its share reduced to the proper amount, though the tax rolls have been distributed among the various town collectors, and it is impossible to distribute the deficiency created by such illegal tax among the towns which should have been charged with it originally. *Geneva v. Board*, 50 Misc. Rep. 63, 100 N. Y. S. 330, affirmed in 114 App. Div. 915, 100 N. Y. S. 1136, which was reversed in 188 N. Y. 1, 80 N. E. 381.

Supplement of the tax act approved April 11, 1866, § 13, amended by Act 1883 (Gen. St. p. 3309, § 140), provides that the board of assessors shall ascertain the whole value of property contained in the duplicates of the several assessors, and adjust the proportion or quota of tax to be levied on each township or ward in proportion to such value, provided that, if it appear "from a careful, particular, and thorough comparison of the respective duplicates" that the value in any duplicate is relatively less than the value of other property in the county, they may add thereto such percentage as may appear proper. On certiorari to review a resolution of assessors ordering a deduction made at the request of a bank to be added to the duplicate of the borough the return

failed to show that the assessors made a "careful, practical, and thorough comparison," or that they adjudged the value of the property contained in any duplicate to be relatively less than the value of any other property in the county, and showed that, instead of adding a percentage to the duplicate, they added a specific sum, made up with reference to the value at which the bank stock had been assessed by the municipal authorities. Held, that on the return the action of the assessors was not warranted by law. *Borough v. Board* (N. J.), 56 Atl. 121.

Laws 1897, c. 28, § 42, requires the county auditor to transmit, for the use of the state board of equalization, an abstract of the assessment lists, wherein the property listed is grouped into thirteen distinct classes, one of which is "the total value of stocks or shares." Section 45 authorizes the board to consider the lands and town lots of a county as a single class, although grouped separately in the auditor's abstract, and the board is further authorized to "equalize the assessment of personal property by adding to the aggregate assessed value of any class of personal property of every county in which they believe such valuation is too low such rate per centum as will raise the same to its proper proportionate value and by deducting from the aggregate assessed value of any class of personal property, in every county in which said board may believe the valuation to be too high, such per centum as will reduce the same to its proper proportionate value." Section 44 requires the board to examine carefully the abstracts, and, by comparison of like classes of property, ascertain a true proportionate value of all the property in the state. Held, that the board is not authorized to divide the property classified as "the total value of stock and shares," and raise the valuation of bank stock, without increasing that of other stocks and shares. *Campbell v. Minnehaha Nat. Bank*, 11 S. Dak. 133, 76 N. W. 10.

82. Invalidity of acts of board not authorized by statute.—*Campbell v. Minnehaha Nat. Bank*, 11 S. Dak. 133, 76 N. W. 10.

of each county, and whenever they are satisfied that valuation has not been made with reasonable uniformity by the different county assessors, they shall equalize such assessments throughout the territory, the board has power to equalize valuation fixed on the capital stock of banks in the return, or by the assessor or county boards of equalization, where the tax rolls show that valuation was not fixed with reasonable uniformity, whether or not appeal has been taken by a taxpayer.⁸³ A state board of equalization is not authorized to treat bank stocks, as composing a class distinct from other stocks, even where there are only bank stocks assessed in a county.⁸⁴

Method of Equalization.—Where the method of equalizing the valuation of taxable property in the several counties in the state is provided for by statute, such method applies to the taxable property in the county, and not to the property over which the taxing power has no jurisdiction.⁸⁵

§ 329 (4) Review, Correction, or Setting Aside of Assessment—

§ 329 (4a) In General.—It may be stated as a general rule, that in the case of assessments on the property of bank or shares of bank stock which are merely irregular, excessive, or unequal, the remedy provided by statute is exclusive.⁸⁶ Where an assessor makes an unauthorized assessment of the

^{83.} **Powers of board.**—*Territory v. First Nat. Bank*, 10 N. Mex. 283, 65 Pac. 172.

^{84.} *Coles v. Sterling*, 11 S. Dak. 140, 76 N. W. 12.

^{85.} **Statutory method of equalization applies to taxable property in county.**—*Weiser Nat. Bank v. Jeffreys*, 14 Idaho 659, 95 Pac. 23.

^{86.} **Exclusiveness of statutory remedies in case of irregular, excessive or unequal assessments.**—*State v. Bank*, 120 Mo. 161, 25 S. W. 372; *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621; *Senour v. Matchett*, 140 Ind. 636, 40 N. E. 122; *People's Sav. Bank v. Layman*, 134 Fed. 635.

"For a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgments only, the sole remedy for an application is an abatement, either to the assessor, or to such statutory board as has been provided for hearing. The courts, either of common law or of equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be equally empowered by law to do so; and this principle is applicable to statutory boards of equalization which are only assessing boards, with certain appellate powers, but whose action if they keep within their jurisdiction is conclusive, except as otherwise provided by law. For a merely irregular assessment, the statu-

tory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the party's own folly if he fails to avail himself of it." *Gracy v. Bank*, 120 Mo. 161, 25 S. W. 372, quoting *Cooley on Taxation* (2nd Ed.), 748, 750.

"As a general rule, equity has nothing to do with the correction of erroneous assessments. Aside from the requirements of the statute, public policy requires that the revenues should be promptly assessed and collected by those officers and through those agencies which the law has specially provided for that purpose. Unless, therefore, a case can be brought, by its particular and peculiar facts, under some one of the heads of equity jurisdiction, such as the preventing a multiplicity of suits, removing cloud from title, or the like, equity will not ordinarily interfere, unless the tax be illegal. The remedy prescribed by statute in most cases will be found ample and expeditious, and in such cases it ought to be exclusive." *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

"*Burroughs on Taxation*, § 102, states the rule thus: 'Errors, what tribunal corrects. Where the assessors have jurisdiction of the persons or property assessed, they act judicially; and, like the judgment of any other tribunal, their acts are conclusive until reversed in the mode pre-

shares of bank stock to the bank, and the bank does not ask the board of equalization to correct such erroneous assessment, it can not enjoin the collection of the taxes, in the absence of a valid excuse for its failure to apply to such board.⁸⁷

§ 329 (4b) Grounds of Review.—Errors in the valuation of shares of bank stock is ground for review of assessment.⁸⁸ When the assets of a savings bank have been reduced in valuation below the amount due to depositors, a petition may be maintained for an abatement of taxes to a corresponding extent.⁸⁹ Where a bank has returned, in its list of property for taxation, its capital stock as property owned, possessed or controlled by it, if it desires to object to being thus assessed, it should go before the board of equalization and have the correction made.⁹⁰

§ 329 (4c) Right of Review—§ 329 (4ca) Persons Entitled.—In

scribed by law. Whether the error be in the valuation of property at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, the decision of the assessor can not be attacked collaterally. The remedy is by appeal to that tribunal provided by statute; and, if there be none provided, then it is by certiorari. And this principle seems to be supported by many authorities. *Stewart v. Maple*, 70 Pa. 221; 1 High. Inj., §§ 488, 492, 493; *Hughes v. Kline*, 30 Pa. 227; *Macklot v. Davenport*, 17 Iowa 379; *Merrill v. Gorham*, 6 Cal. 41; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; 2 *Desty, Tax'n*, 661; *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243; *Seeley v. Westport*, 47 Conn. 294, 36 Am. Rep. 70; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Mayor v. Meserole* (N. Y.), 26 Wend. 132; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Cooley, Tax'n*, 542." *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

As to propriety of review by certiorari, mandamus or injunction, see post, "Certiorari to Review Assessment," § 329 (4k); "Mandamus to Correct Assessment," § 329 (4l); "Injunctions to Restrain Assessment," § 329 (4m).

87. Valid excuse for its failure.—*First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

"It is not contended that any unjust discrimination as between this bank stock and other moneyed capital in the state has been made in the taxation thereof. It can only be contended that the assessment was illegal, in that the capital stock was assessed to the bank instead of the in-

dividual shareholders. To correct this irregularity, it was the duty of plaintiff to apply to the board of equalization. *Meyer v. Rosenblatt*, 18 Mo. 495; *Oteri v. Parker*, 42 La. Ann. 374, 7 So. 570; *Board v. Searight Cattle Co.*, 3 Wyo. 777, 31 Pac. 268; *Meade v. Haines*, 81 Mich. 261, 45 N. W. 836." *First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

88. Errors in valuation of stock.—Relator was a stockholder in the Exchange Bank of the city of Albany, the stock of which was above par, but was not as valuable by about 60 per cent as stock in the Mechanic's Bank, situated in the same ward. The shares of both banks were assessed at par, instead of their actual value, as they should have been assessed, and relator applied to have the assessment corrected. Held, that while a correction would increase the relator's tax on his bank stock, yet as the error relieved from taxation a large amount of property owned by the Mechanics' Bank, thereby increasing the rate of taxation on all property in the assessment roll, the relator had a right to complain. *People v. Assessors* (N. Y.), 2 Hun 583.

The remedy of the owner of national bank shares for excessive valuation is by appeal from the assessment, and a failure to appeal will be deemed a waiver of any objection to the valuation. *Appeal of Everitt*, 71 Pa. 216.

89. In re Wolfeborough Sav. Bank. 69 N. H. 84, 39 Atl. 522.

90. Objection to assessment on property as listed by bank.—*First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

the case of assessments of bank property or shares of bank stock, the general rule applies that an appeal to the proper board or other tribunal may be had by any one aggrieved by the assessment,⁹¹ and has an interest in the property assessed.⁹² Under a statute providing that banks shall pay taxes assessed to the stockholders on their stock, and may recover from each stockholder his proportion of the taxes, on an assessment against the stockholders of a bank, the bank itself is a party in interest, and has a right to appear before the board of review and complain of the assessment,⁹³ and to appeal from the board's decision to the district court.⁹⁴ A law providing that any bank which may claim that the taxes assessed upon it are inequitable may apply for an abatement thereof, may be applied to a cause of action which accrued before the enactment thereof, as such act merely changes the mode of judicial procedure to enforce a right without affecting the right itself.⁹⁵ Where a city has a direct interest in the amount and validity of the state and county tax levied on its taxpayers, and is unjustly affected by the illegal

91. General rule as to review at instance of aggrieved party.—Laws 1866, c. 761, subjects the real estate of banks to ordinary taxation, and also the stock, less the assessed value of the real estate. Laws 1859, c. 302, provides that any one aggrieved by the assessment may, before May 1st, apply to have it corrected, and the commissioners, if they judge it erroneous, may correct it. The same act authorizes the commissioners before April 2d to increase any assessed valuation, but not without giving notice to the person affected, twenty days before the closing of the books, which were closed May 1st. Held that, where the assessed valuation of the real estate has been reduced on application made April 30th, the commissioners may increase proportionately the assessment on the stock, though the required notice is then impossible. *Apgar v. Hayward*, 110 N. Y. 225, 18 N. E. 85.

92. Interest essential to right of review.—Shares of stock in a national bank were assessed at their par value, no objection being made at the time. The bank afterwards failed, and the receiver applied for a reduction of the tax, so that it should be based on the actual value of the shares. Held, that the relief could not be granted, for the reasons—First, that the stockholders were concluded; and second, that the bank and receiver had no interest. *People v. Wall St. Bank* (N. Y.), 39 Hun 525.

Under 13 Stat. 112, which provides that the value of the shares of a national bank may be assessed for taxa-

tion against the individual shareholders, but not against the bank, where, by reason of an accumulated surplus, the shares of a bank are increased in value, and an assessment is made against the surplus of the bank, which, on objection, is taken from the assessors' rolls, and the amount distributed among the shareholders, the bank has no interest to review the assessment. *First Nat. Bank v. Button*, 63 Hun 624, 17 N. Y. S. 315.

93. Right of bank paying taxes assessed to stockholders to complain of assessment.—*First Nat. Bank v. Independence*, 123 Iowa 482, 99 N. W. 142; *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

Where a national bank has complied with the provisions of Pub. St., c. 13, § 11, which requires a list to be furnished the assessors showing the name of each shareholder, with his residence, and the number of shares belonging to him, this satisfies the requirements of chapter 11, § 72, which provides that no person shall have an abatement of his taxes unless he has filed a list sworn to contain all his taxable property; and the bank, not its shareholders, is the one to petition for an abatement of taxes on such shares. *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532; *Adams v. New Bedford*, 155 Mass. 317, 29 N. E. 532.

94. Appeal from decision of board to district court.—*First Nat. Bank v. Independence*, 123 Iowa 482, 99 N. W. 142.

95. In re *Wolfeborough Sav. Bank*, 69 N. H. 84, 39 Atl. 522.

action of a county board, it is entitled to sue to correct the same.⁹⁶ Where the supervisors of a county improperly assess the shares of bank stock in a certain city other than in the manner provided by statute, whereby the tax of said city is increased, the city is not deprived of its right to have its shares reduced to the proper amount, though the tax rolls have been distributed among the various town collectors, and it is impossible to distribute the deficiency created by such illegal tax among the towns which should have been charged with it originally.⁹⁷

§ 329 (4cb) Estoppel or Waiver.—In the case of assessments against banks or on shares of bank stock the usual rule applies that prior statements by an owner as to the assessable nature of his property will not estop him for all future time to question the legality of assessments made against his property.⁹⁸ A bank is not estopped from denying liability to pay a tax levied on its capital stock as the personal property of the bank by the fact

96. Right of city to sue to correct illegal assessment.—Under Laws 1896, p. 806, c. 908, § 24, as amended by Laws 1901, p. 1350, c. 550, a tax on bank stocks is raised for local purposes and divided among the local districts for village, city, town or school purposes only, and is in lieu of all other taxes whatsoever for state or local purposes on such stock. The board of supervisors of Ontario county, in estimating the share of the city of Geneva for city and county taxes, included in the personal property of the city the shares of the banks in the city, thereby increasing the city tax by about \$1,000. Laws 1897, pp. 458, 460-462, c. 360, §§ 110, 114, 115, 119, relate to the equalization of assessments between the city of Geneva and the several towns in the county and the apportionment of the tax, and provide that any deficiency in the county of the tax remaining uncollected shall be paid out of the general city funds to the county treasurer, and that all unpaid state and county taxes shall thereafter belong to the city, which may compel payment to reimburse itself. Held to give the city a direct interest in the amount and validity of the state and county tax levied on its taxpayers, so that it was injuriously affected by the illegal action of the county board and entitled to sue to correct the same. *Geneva v. Board*, 50 Misc. Rep. 63, 100 N. Y. S. 330, affirmed in 114 App. Div. 915, 100 N. Y. S. 1136, which was reversed in 188 N. Y. 1, 80 N. E. 381.

The court in this case said: "It would seem, therefore, that the city has a direct interest in its capacity as

a municipal corporation in the amount, validity and enforceability of the state and county tax levied upon the taxpayers of Geneva; and the relator, being injuriously affected by the illegal action of the board, is entitled to have this error corrected and the share of the state and county tax to be collected by its officers or paid out of its treasury reduced to the proper amount, if that can be done at the present time. The board of 1905 has gone out of existence. It duly issued the warrants to the collectors of the various towns of the county, and the tax rolls thus made up are in the process of collection, and there would seem to be no way in this proceeding for those tax rolls to be recalled and corrected. *People ex rel. Lorillard v. Supervisors of Winchester County*, 15 Barb. 607; *Colonial Life Assurance Co. v. Board of Supervisors of New York County*, 24 Barb. 166; *High Leg. Rem.*, § 140." *Geneva v. Board*, 50 Misc. Rep. 63, 100 N. Y. S. 330, affirmed in 114 App. Div. 915, 100 N. Y. S. 1136, which was reversed in 188 N. Y. 1, 80 N. E. 381.

97. Correction of improper assessment of bank stock increasing tax of city.—*Geneva v. Board*, 114 App. Div. 915, 100 N. Y. S. 1136, affirming order, 50 Misc. Rep. 63, 100 N. Y. S. 330.

98. Prior statements as to assessable nature of property as estoppel to question assessment.—*Mahkonsa Invest. Co. v. Fort Dodge*, 125 Iowa 148, 100 N. W. 517.

Though a loan and trust company in former years objected to an assessment of corporate stock against it, and also insisted that it was a savings bank, and not assessable as a

that for several years it had paid taxes so levied.⁹⁹ Where the stock which a bank owns in another corporation or its own is not subject to taxation for school purposes, the bank does not waive its objection to the assessment of such tax by ignoring it and omitting to appear therefrom in the manner prescribed by statute.¹ The fact that a bank, after due protest, has paid in full the tax assessed on its shares of stock in the hands of shareholders is no ground for objecting to the claim of the bank to an abatement of the tax, where such payment is by statute made an express condition of the granting of an abatement.² Where an assessor states to the officers of a national bank, when it presents its list of stock to him for taxation, that such stock will be assessed at a certain value, but he assesses it at a higher value, and the bank is given no notice thereof, it may maintain an action for relief against such excessive valuation, though it does not go before the board of equalization, and ask for a reduction, since the act of the assessor was a fraud on the bank.³ Where the officers of a bank furnish the assessor with the names of the shareholders, together with the amount of the stock held by each, and make no objection on the ground of irregularity of the assessment, and are themselves a party to it, and the claims of the assessor are substantially correct, such officers can not be permitted to claim that his error in assessing the shares to the bank, instead of its stockholders, rendered the assessment void, and the collector a trespasser.⁴ A tax assessor can not be presumed to have personal knowledge of the private affairs of persons assessed unless they choose to furnish it, as of the amount of debts due by the holder of bank stock subject to taxation, and, if the taxpayer takes no steps to have the tax corrected, he must be assumed to admit its correctness.⁵

loan and trust company, this did not estop it by record from claiming a right to be assessed according to the statute governing loan and trust companies. *Mahkonsa Invest. Co. v. Fort Dodge*, 125 Iowa 148, 100 N. W. 517.

99. Effect of payment of similar tax in previous years.—*Farmers', etc., Bank v. Hoffmann*, 93 Iowa 119, 61 N. W. 418.

1. Where exempt property assessed.—*School Directors v. Carlisle Bank (Pa.)*, 8 Watts 289.

2. Effect of payment by bank of tax on shares.—*National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

Where, on a petition by a national bank for the abatement of a tax, it was found as a fact from the report of a commissioner appointed under St. 1890, c. 127, § 5, that for the purposes of taxation the fair cash value of the shares, at which they are assessable by Pub. St., c. 13, § 8, was their market value as found by him, and a ruling was made that upon the facts the

assessors had no right to assess the stock upon the basis of the value as shown by the capital stock, the surplus fund, and the undivided profits, irrespective of other evidence in the case, and that such assessment should be abated as to the excess above the fair cash value found to be the market value as first stated, it was held that the ruling was correct; and that the fact that, after filing a written protest in due form, the bank paid the full tax assessed less certain discounts, constituted no bar to a recovery. *National Bank v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

3. Citizens' Nat. Bank v. Columbia, 23 Wash. 441, 63 Pac. 209.

4. Effect of failure of bank furnishing list of stock and stockholders to object to irregularity of assessment.—*St. Louis Bldg., etc., Ass'n v. Lightner*, 47 Mo. 393.

5. Effect of failure by owner of bank stock to have tax corrected as to deductions of indebtedness.—*First Nat. Bank v. St. Joseph*, 46 Mich. 526, 9 N. W. 838.

§ 329 (4d) Creation and Organization of Board of Review or Other Special Tribunal.—In General.—The power to review, correct, or set aside assessments is vested by the statutes of the various states in boards of equalization or other special tribunals.⁶

Qualification of Members.—The objection that a member of a board of equalization is not a freeholder, as required by statute, can not be made in an action by a bank to recover taxes paid.⁷

§ 329 (4e) Authority, Powers and Duties of Board or Officers.—In General.—The duty of boards of equalization of review is to equalize assessments, and in so doing, they may make either additions or reductions.⁸ Such boards have the power to correct errors and omissions in assessment rolls in the state or county in which they act,⁹ upon proceedings brought within the proper time.¹⁰ Thus, for instance, in the case of the assessment of bank property or shares, as in the case of the assessment of the property of natural persons or other corporations, a board of equalization, has power to correct an assessment when property has been assessed to a party which he does not own;¹¹ where there has been a double assessment,¹² or where property exempt from taxation has been assessed, etc.¹³

Assessment of Property Omitted.—In some jurisdictions boards of equalization of review, in making the proper corrections, may place on the assessment roll property of a bank or shares of bank stock which have been

6. Power of review, correction, or setting aside vested in statutory boards, etc.—*State v. Bank*, 120 Mo. 161, 25 S. W. 372; *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

The remedy of the taxpayer, in all ordinary cases for errors in his assessment, is to go before the board of equalization; and, failing to obtain redress, to seek it by writ of review. *Rhea v. Umatilla*, 2 Ore. 298, and *Poppleton v. Yamhill*, 8 Ore. 337, approved. *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

Under Revised Statutes of Missouri, 1879, § 6719, to correct an excessive assessment merely, an appeal must be taken to the county board of equalization. *State v. Bank*, 120 Mo. 161, 25 S. W. 372.

Where the county board of equalization left bank stock assessed at one-third valuation, and the state board placed the valuation at 40 per cent, application must be made to the state board for correction of errors, and not to the county board. *Sioux Falls Sav. Bank v. Minnehaha County (S. Dak.)*, 135 N. W. 689.

7. Objection to qualification of members.—*State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A., N. S., 663.

8. Authority and powers in general.—*State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 17 L. R. A., N. S., 663; *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

9. Power to correct errors and omissions.—*Union, etc., Nat. Bank v. Board*, 65 Neb. 408, 91 N. W. 286, 92 N. W. 1022.

10. Union, etc., Nat. Bank v. Board, 65 Neb. 408, 91 N. W. 286, 92 N. W. 1022, in which it was held that the board had power to make such corrections within a certain period from the time the taxes would, if legally assessed, have become delinquent.

11. Correction where property assessed to other than owner.—*First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83; *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

Where bank stock is erroneously assessed to the bank instead of the stockholders, the board of equalization may correct the assessment. *First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

12. In case of double assessment.—*First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

13. Where exempt property assessed.—*First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

omitted by the assessor, or not assessed.¹⁴ Under the statutes of Ohio, as construed by its supreme court, where proper return has been made of the stock of a national bank for taxation from the value of which stockholders have been allowed to deduct their indebtedness as in case of other moneyed capital, a county auditor has no power, in a subsequent year to place the amount of such deduction in the duplicate list as an omission and collect taxes thereon, although the deductions were not authorized by law.¹⁵

Increase or Deduction of Valuation of Tax.—A board of equalization has the power and jurisdiction to increase the value which has been fixed on bank stock by the assessor,¹⁶ and this, though the person assessed has taken no appeal to the board.¹⁷ Where an inequality exists in the assessment of property within a county, an owner of property discriminated against is entitled to a correction of his assessment, although such relief necessitates the reduction of the valuation of his property below its true cash value.¹⁸

§ 329 (4f) Place and Time of Meeting of Board.—The time, place, and duration of meetings of boards of equalization or review are usually

14. Power to place on assessment roll omitted property.—Oregon, etc., *Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621; *Bank v. Lafayette*, 79 Miss. 152, 29 So. 825.

Ky. St., § 3403 (Russell's St., § 1467), provides that where any property has not heretofore been assessed for taxation, or has been improperly assessed, or where notice of the time and place of the meeting of the board of supervisors of tax has not heretofore been properly or regularly given, cities of the third class can pass an ordinance directing the assessment of such property, etc., and that its object is to insure the collection of any unpaid taxes, and that the provisions shall not extend back for more than five years. Act June 11, 1906, provided for the taxing of shares of banks and trust companies at the same rate as for other personalty, which was to be assessed by a local assessing officer. Held that, where the local assessing officer had not made an assessment of the shares of stock of a bank for 1906, the council had authority under § 3403 to provide for its assessment, as that section applied to all cases "where property has not been assessed for taxation," the word "heretofore" being required to be read as referring to the time of the passing of the ordinance, and the five years allowed being counted, not from the time of the passage of the act, but from the time the assessment is made. *Richardson v. State Nat. Bank (Ky.)*, 123 S. W. 294.

15. Mercantile Nat. Bank v. Lander, 109 Fed. 21, affirmed in *Lander v. Mercantile Nat. Bank*, 55 C. C. A. 523, 118 Fed. 785.

Directing assessor to assess omitted property.—An order of the board of equalization finding that a bank has omitted property from the list of its taxable property, and should be assessed thereon, and directing the assessor to add such property to its assessment, is not an attempt by the board to add property to the list, and exercise assessorial powers, but is a direction that the assessor make such addition, though the order specifies the value of the property to be added, and is authorized by Pol. Code, § 3681, requiring the assessor, at the request of the board, to list and assess property which he has failed to assess. *Farmers', etc., Bank v. Board*, 97 Cal. 318, 32 Pac. 312; *Security Sav. Bank, etc., Co. v. Los Angeles*, 99 Cal. xix, 34 Pac. 437.

16. Power to increase valuation fixed by assessor.—*Ward v. Board*, 135 Mo. 309, 36 S. W. 648; *Blocklock v. Board (Mo.)*, 36 S. W. 1132; *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

17. Right to raise assessment though person has not appealed to board.—*State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A., N. S., 663.

18. Reduction of valuation or tax.—*First Nat. Bank v. Board*, 36 Colo. 265, 84 Pac. 1111.

fixed by statute, and if, at the time the valuation of a bank's capital stock was increased by such board, the board was not legally in session, its acts were void,¹⁹ and in such case, the court of equity may properly exercise its preventive jurisdiction by injunction to protect the parties threatened with injury.²⁰ The legislature may, however, constitutionally legalize special meetings of a state board, not authorized by the statute creating the board.²¹

§ 329 (4g) Notice to Parties Interested.—As a general rule it is essential that a taxpayer who may be affected by the action of a board of equalization or review, with regard to his assessment, shall have due notice of the proposed action of the board, and such rule is equally applicable in the case of assessment of bank property or shares of stock, as in the case of assessments of other property, at least where it is sought to increase the valuation.²² It has been held, however, that such notice is not necessary to

19. Invalidity of increase of valuation by board not legally in session.—*Yocum v. First Nat. Bank (Ind.)*, 38 N. E. 599.

Exclusion of Sundays in computing duration of session.—Under 3 Burns' Rev. St. 1894, § 8533, providing, in regard to the assessment of taxes, that the "duration of the session of the board of review shall not exceed 18 days," Sundays are to be excluded in determining its duration. *Yocum v. First Nat. Bank (Ind.)*, 38 N. E. 599.

20. *Yocum v. First Nat. Bank (Ind.)*, 38 N. E. 599.

21. Power of legislature to legalize special meeting of board.—*First Nat. Bank v. Isaacs*, 161 Ind. 278, 68 N. E. 288.

22. Necessity for due notice to interested parties.—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485; *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621; *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908.

Rev. St. Ohio, §§ 2808, 2809, which require the state board of equalization for incorporated banks to meet annually on a fixed date, to examine the returns of said banks to the county auditors, and the value of their shares as fixed by the auditors, and to hear complaints and equalize the value of said shares "according to the rules prescribed in title 13 for valuing and equalizing the values of real and personal property," when read in connection with the provisions of said title 13, confer no power on the board to change the valuation of bank shares without reasonable notice to the parties interested and an opportunity for a full hearing; and an increase in the valuation of the shares of a national

bank made by such board at a subsequent meeting, to which no adjournment was shown by its records, and without notice to the bank or its shareholders, is not merely irregular, but is void for want of jurisdiction. Judgment, 98 Fed. 465, reversed. *Mercantile Nat. Bank v. Hubbard*, 45 C. C. A. 66, 105 Fed. 809.

The equalization board for banks acquires jurisdiction by meeting on a certain day named by statute, and every bank in the state is charged with notice of that meeting; but when the board adjourns without naming a time to meet again, but on call of the president, the banks are left without knowledge of the time when the board will meet again, and unless due notice is given of such meeting the proceedings thereat will be void. *Euclid Ave., etc., Banking Co. v. Hubbard*, 12 O. C. D. 279, 22 O. C. C. 20.

Rev. St., § 2809, providing that the board of equalization for banks "shall hear complaints and equalize the value of said shares according to the rules prescribed by this title for valuing and equalizing the values of real and personal property," is broad enough to include, not only the rules for assessing property, but also for equalizing the value of property, and is governed by § 2804, Id., providing that notice shall be given to all persons directly interested. *Euclid Ave., etc., Banking Co. v. Hubbard*, 12 O. C. D. 279, 22 O. C. C. 20.

A bank, seeking to restrain the collection of an increased tax made by the equalization board without notice to it, is not obliged to show that its property is taxed at more than its true value in money; such action of the board being a complete nullity. *Euclid*

the assessment of omitted property,²³ or where the capital stock of a bank

Ave., etc., *Banking Co. v. Hubbard*, 12 O. C. D. 279, 22 O. C. C. 20.

Tax Law, Laws 1896, p. 805, c. 908, § 23, as amended by Laws 1901, p. 1349, c. 550, provides that the assessment of bank stock shall be made June 1st, and requires the chief fiscal officer of every bank on or before July 1st to furnish the assessors with a statement of its assets and names of its stockholders. Laws 1896, p. 806, c. 908, § 24, as amended by Laws 1901, p. 1350, c. 550, provides that complaints in relation to assessments of bank stock shall be heard and determined as provided in Tax Law, Laws 1896, p. 810, c. 908, § 36. Section 36 relates to assessments appearing on assessment rolls completed on or before August 1st, and provides that the assessors shall meet for the purpose of hearing complaints at the time and place specified in the notice required by § 35. Section 35 provides that notice of the completion of the assessment roll shall be given for the third Tuesday in August, but that in any city the notice shall conform to the requirement of law regulating the time, place, and manner of revising assessments in such city. Greater New York Charter, Laws 1901, pp. 279, 381, c. 466, §§ 892, 895, provides that real and personal property, but not including bank shares, shall be assessed as of the second Monday of January, and that the time for hearing complaints and revising the assessments by the assessors shall expire May 31st. Section 907 (page 386) provides that the assessment rolls of real and personal property, other than bank shares, shall be delivered to the board of aldermen on the first Monday of July. Under the charter the aldermen estimate the tax rate to be imposed upon the taxable property of the city and levy a tax upon each piece of real or personal property, but not upon bank stock. The commissioner of taxes and assessments certifies the amount of such tax, and the persons taxable to the receiver of taxes, by the 15th of September, and the taxes thereon become payable during that month. Held, that the provision in § 35 concerning notice in cities does not apply to the assessment of bank shares in the city of New York, since it would be impossible to thus apply it without denying the taxpayer a grievance day. Order, 120 App. Div. 838, 105 N. Y. S. 993, re-

versed. *Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592.

Sufficiency of notice.—A notice to a bank to appear before the board of equalization, and show cause why its "assessment on solvent credits should not be increased from \$2,774 to \$275,000," sufficiently informs it that it is proposed to add property to the assessment. *Farmers', etc., Bank v. Board*, 97 Cal. 318, 32 Pac. 312; *Security Sav. Bank, etc., Co. v. Los Angeles*, 99 Cal. xix, 34 Pac. 437.

Notice of the time and place of the first meeting of the state board for the equalization of the shares of incorporated banks, given by the provisions of Rev. St. Ohio, § 2808, designating the time and place for such meeting, is sufficient notice to any banks which may be affected by its action, although such action may be taken at a meeting of the board held after it has adjourned without fixing a date for a subsequent meeting. *Judgment, Mercantile Nat. Bank v. Hubbard*, 45 C. C. A. 66, 105 Fed. 809, reversed. *Lander v. Mercantile Nat. Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908.

Notice to bank as notice to stockholders.—Under Ballinger's Ann. Codes & St., § 1677, providing that bank stock shall be assessed in the cities where the banks are situated—§ 1678 directing that the bank pay the tax assessed on its shares, and making it liable for the payment, and § 1680 requiring the cashier to deliver to the assessor a list of the shareholders—notice by a board of equalization to a bank to show cause why its assessment should not be raised is notice to the stockholders, as the bank, as respects taxation, stands as their agent. *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126.

23. Notice unnecessary to assessment of omitted property.—The board of equalization, in making the proper corrections under § 2779, Hills' Code, may place on the assessment roll property of a taxpayer which had been omitted by the assessor, or not assessed; and this, without the three days notice to such taxpayer. Notice is requisite only when the valuation of property already assessed is raised. *Oregon, etc., Sav. Bank v. Jordan*, 16 Ore. 113, 17 Pac. 621.

A notice by a board of equalization to a bank to show cause why its personal assessment should not be raised

was previously assessed to the wrong party.²⁴

§ 329 (4h) Complaint or Petition.—In the case of assessment of banks or bankers, the usual rule applies that to authorize the board of equalization to increase an assessment, a complaint must be made, and testimony taken upon the same, authorizing such increase; otherwise the board will have no power.²⁵

§ 329 (4i) Determination or Decision.—In General.—Under a statute providing that bank stock shall be entered for taxation in the names of the holders of the several shares thereof, respectively, the fact that a board of review's resolution provides for the assessment of the "capital stock" of a bank partnership, while the assessment, as entered, describes the property as "capital," is immaterial.²⁶

Conclusiveness of Decision.—The action of the statutory boards upon applications to them for the review, correction, or setting aside of assessments, if they keep within their jurisdiction, is conclusive, except as otherwise provided by law.²⁷

§ 329 (4j) Review of Decision of Board—§ 329 (4ja) On Appeal from County to State Board.—In General.—In some jurisdictions express provision is made for an appeal from the action of a county board of

is sufficient to advise the bank, so as to cover the shares of stock taxable in connection with the realty of the bank; and the owners of the stock, after the bank has recognized the board's jurisdiction and submitted to it, are concluded by its assessment. *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126.

24. Where capital stock of bank assessed to wrong party.—*B. & C. Comp.*, § 3080, provides that if it shall appear to the board of equalization that any property has been assessed in the name of a person not the owner, or assessed under or beyond its actual value, it shall make the proper corrections; but § 3081 declares that the board shall not increase the valuation of any property so assessed without giving to the person in whose name it is assessed three days in which to show cause why the valuation should not be increased, etc. The capital stock of a bank was erroneously assessed to the bank, and it appeared and objected, whereupon the board of equalization assessed the stock to the stockholders, and increased its valuation. Held, that such increase was not void for failure to give notice, but that, as the stock had previously been assessed to the wrong party, the change assessing it to the stockholders at an increased valuation was, as to

them, an original assessment. *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

25. Necessity for complaint on increase of assessment sought.—*Dixon County v. Halstead*, 23 Neb. 697, 37 N. W. 621.

Charge of assessor as sufficient complaint.—Where a private banker converts his assets into United States bonds, for the purpose of evading taxation by the state, they are not exempt, and where the assessor, after June 1st, added the value of such bonds to the banker's assessment list, and, after notice, he appeared and contested such increase before the board of equalization, the charge of the assessor was in the nature of a complaint by a competent party, sufficient to warrant the action of the board of equalization thereon. *Dixon County v. Halstead*, 23 Neb. 697, 37 N. W. 621.

26. Effect of resolution providing for assessment of "capital stock" described in assessment as "capital."—*State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

27. Conclusiveness of action of board upon application to review, correct, or set aside assessment.—*State v. Bank*, 120 Mo. 161, 25 S. W. 372. And see *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126.

review to the state board of tax commissioners, and under such statute a bank is entitled to appeal from the action of the county board in fixing its assessment.²⁸ It has been held, however, that, under such a statute, no appeal will lie to correct any error of a board of supervisors in not including in the aggregate assessment, to determine the tax rate, the value of any bank stock; mandamus being the proper remedy to correct such an error.²⁹

Record on Appeal.—On receiving notice of an appeal from an action of the county board of review fixing a bank's assessment, it is made the duty of the county auditor to make out a written statement showing the substance of the complaint made, if any, and the action of the board thereon, which shall be transmitted to the state auditor, to be laid before the state board of tax commissioners.³⁰

Order of State Board.—An order of a state board of taxation on appeal from the action of a county board of review fixing a bank assessment is sufficiently definite where it plainly indicates the total assessment.³¹ Under a statute providing that the state board of tax commissioners shall, on appeal from an assessment, assess the property in controversy, and the state auditor shall certify to the county auditor the changes made, and the amounts assessed by the state board shall be by the county auditor extended on the tax duplicates in lieu of the amounts fixed by the towns or county officers, etc., the county auditor has no power to revise or change the valuations made by the state board.³²

§ 329 (4jb) Review by Courts.—In a number of jurisdictions express provision is made by statute for appeals from orders of boards of equalizations or review to a court of law, usually the district court.³³ On appeal

28. Appeal from county to state board.—First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288; Hunt *v.* Priest, 90 App. Div. 520, 85 N. Y. S. 481, affirming 180 N. Y. 532, 72 N. E. 1149.

29. Hunt *v.* Priest, 90 App. Div. 520, 85 N. Y. S. 481, affirming 180 N. Y. 532, 72 N. E. 1149.

30. Amendment of record by auditor.—Under such a statute the county auditor has no authority to include in the record a certificate explanatory of the action of the county board, and stating that it had overlooked certain real estate. First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

Record on appeal to state board.—First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

31. Order of state board held sufficiently definite.—A county board of review fixed a bank's assessment at \$2,520 for the realty, \$4,095 for the improvements, and \$136,495 for personalty. The bank had returned \$20,000 worth of realty to the assessor. The bank appealed from the board's ac-

tion, and the State Board of Tax Commissioners ordered that "the valuation of said property be fixed at \$127,110 in addition to the assessed value of the real estate." Held, that the state board's order was sufficiently definite, as indicating a total assessment of \$133,725. First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

32. Conclusiveness of valuations by state board on appeal from assessment.—First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

33. Appeal from orders of board to court of law.—First Nat. Bank *v.* Independence, 123 Iowa 482, 99 N. W. 142; German-American Sav. Bank *v.* Burlington, 118 Iowa 84, 91 N. W. 829.

Sufficiency of notice of appeal.—A notice of appeal from the decision of a board of review assessing taxes on the stock of a bank, without more, is sufficient to confer jurisdiction of the proceeding on the district court. German-American Sav. Bank *v.* Burlington, 118 Iowa 84, 91 N. W. 829.

from an order of a board of equalization in the matter of assessment of bank property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal.³⁴

§ 329 (4k) Certiorari to Review Assessment.—In some jurisdictions it is expressly provided by statute that a writ of certiorari to review an assessment may be allowed on petition of any person claimed to be aggrieved thereby,³⁵ provided the application for the writ be made within the prescribed time;³⁶ and where this is the case, a national bank may maintain

34. Scope of hearing on appeal.—First Nat. Bank v. Webster County, 77 Neb. 813, 110 N. W. 535, citing Nebraska Tel. Co. v. Hall, 75 Neb. 405, 106 N. W. 471.

35. Certiorari to review assessment.—American Exch. Nat. Bank v. Purdy, 196 N. Y. 270, 89 N. E. 838, reversing order, 132 App. Div. 931; 117 N. Y. S. 1144; Mercantile Nat. Bank v. New York, 27 Misc. Rep. 32, 57 N. Y. S. 254; Bank v. Miller, 84 App. Div. 168, 82 N. Y. S. 621, modifying 177 N. Y. 461, 69 N. E. 1103.

Laws 1909, p. 119, c. 74, was enacted to cure the invalidity of assessments on bank stock for the year 1901 to 1907, inclusive, caused by want of notice and an opportunity to the stockholders to be heard, as required by the tax law (Laws 1896, p. 795, c. 908) as construed by the court of appeals. Section 1 of chapter 74 authorized the board of taxation and assessments of the city of New York to cancel or reduce the assessments made by the board for those years, provided that such assessment should be open to public inspection, that application for reduction or cancellation might be made to the board by a certain date, by any person aggrieved, who should have a hearing on request, and authorized certiorari to review the assessment. The last sentence thereof provided that no irregularity theretofore existing in such assessments should warrant relief by the court in any proceeding theretofore or thereafter instituted. Section 2 confirmed all assessments from which relief was not asked, and made every determination on application final unless reversed or modified. Section 3 required the board to certify the determination to the comptroller, who should thereupon collect the assessment and refund any excessive tax paid. Section 4 required the board to publish a notice that assessments would be open to public inspection for a certain period, and that application for reduction or cancellation might be made to the

board by any one aggrieved, who would be heard on request, and that no further notice should be required. Held that, as chapter 74 required further acts to be done by the tax officers, it, in effect, provided for a reassessment or completion of the old assessment, and was constitutional, except the last sentence of § 1, which was beyond the legislative power, as legalizing the assessment without giving an opportunity to be heard upon the question of existing irregularities. Order, 132 App. Div. 931, 117 N. Y. S. 1144, reversed. American Exch. Nat. Bank v. Purdy, 196 N. Y. 270, 89 N. E. 838.

Writ reaches only judgment of board.—The fact that a resolution adopted by a board of review provides for the assessment of the "capital stock" of a banking partnership, while the assessment, as entered, described the property as "capital," is not ground for vacating the assessment on certiorari, as the writ reaches only the judgment of the board. State v. Lewis, 118 Wis. 432, 95 N. W. 388.

36. Time for application.—The New York Tax Law (Laws 1896, p. 811, c. 908), § 38, requires the completed assessment roll of taxes upon bank stock to be held by a date named, and notice given by posting and publication that it has been so filed, and § 251 requires an application for certiorari to review the assessment to be made within fifteen days after the completion and filing of the assessment roll, and the first posting and publication of the notice. Held, that one purpose of notice was to set the fifteen-day period running, and where no notice of filing had been given, when the application for the writ was made, limitations had not run against the application as a matter of law. American Exch. Nat. Bank v. Purdy, 196 N. Y. 270, 89 N. E. 838.

Laws 1909, p. 119, c. 74, was enacted to authorize the completion of assessments upon bank stock which were commenced several years before its enactment but were not completed be-

certiorari in its own name to set aside an assessment made upon shares of its stockholders, where the bank is made the agent for the collection of the taxes, and a penalty imposed for its failure to pay the same to the receiver of taxes.³⁷ So, also, it has been held that the owner of shares of bank stock listed by the bank in the name of the previous owner, and assessed in such name, is within a statute allowing a writ of certiorari to review an assessment at the instance of the party aggrieved.³⁸ A writ of certiorari will also lie upon the relation of a savings bank, to review an assessment of its real property claimed to be excessive.³⁹ Though parties similarly situated may join in a single proceeding for reduction of a tax assessment, a petition by a single bank stockholder, purporting to be in behalf of himself and other stockholders, for certiorari to review the decision of the

cause notice and an opportunity to be heard was not given as required by the tax law (Laws 1896, p. 795, c. 908), and authorizes the board of taxation and assessments to cancel or reduce such assessments upon application made by a certain date after publication of notice for a certain period, and fixes a date for the determination of such application. On certiorari to review an assessment, the case was argued at Special Term before such date had arrived, or such periods had expired, and the return did not show what was done under the statute by the taxing authorities toward completing the assessment, or whether it was canceled, reduced, or completed as originally assessed. Held, that compliance with the statute in completing the assessments could not be presumed, and, in view of the imperfect condition of the record, a supplemental return showing what had been done under the statute as to the assessment against relator was necessary to enable the court of appeals to pass upon the rights of the parties, so that judgment dismissing the writ must be reversed, though the statute is held valid, and the proceedings remitted to enable respondent to move for a supplemental return. *American Exch. Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838.

37. A national bank may maintain certiorari in its own name to set aside an assessment made upon shares of its stockholders by the board of taxes and assessments of a city; the tax law (Laws 1896, p. 795, c. 908) making the bank the agent for the collection of the taxes and imposing a penalty for its failure to pay over the same to the receiver of taxes, and § 250 authorizing certiorari to review the assessment by any one aggrieved thereby. Or-

der, 132 App. Div. 931, 117 N. Y. S. 1144, reversed. *American Exch. Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838.

A national bank may bring certiorari in its own name to review an assessment on stock belonging to its stockholders, who have instructed it not to pay the tax in so far as excessive under the statute requiring notice of assessment to be given to the bank, and not to the stockholders, and requiring the bank to pay the tax from dividends, and Consolidation Act, §§ 819, 820, giving parties "affected" and "aggrieved" a right to review. *Mercantile Nat. Bank v. New York*, 27 Misc. Rep. 32, 57 N. Y. S. 254.

Since Tax Law (Laws 1896, p. 820, c. 908), § 72, requires every bank to pay the assessment on the shares of its stockholders out of the dividends, and imposes a penalty for failing to do so, and makes the tax a lien on the stock until it is paid even after transfer, payment by the bank though without objection or protest, of taxes on the shares of its stockholders, must be deemed an involuntary payment, not only as to the stockholders, but also as to the bank, as otherwise the bank could not maintain proceedings to review the assessment on behalf of its stockholders, which is permitted to avoid multiplicity of actions. *American Exch. Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 838.

38. *Schaeffler v. Barker*, 87 Hun 194, 33 N. Y. S. 1042.

39. Evidence in certiorari to review a savings bank assessment considered, and held to show that the assessment of its real estate was excessive. *Bank v. Miller*, 84 App. Div. 168, 82 N. Y. S. 621, modified 177 N. Y. 461, 69 N. E. 1103.

tax commissioners in refusing to reduce the assessment of the stock of such bank, which failed to show any authority in such stockholder, or in any other signor of the petition, to represent the other stockholders, and which also failed to show that the application to the commissioners has been made properly and in due time by all the purported petitioners, or some one duly authorized by them, was fatally defective as a joint petition.⁴⁰

§ 329 (41) Mandamus to Correct Assessment.—Mandamus will lie to correct an assessment of the property of a bank on the shares of its stock, where the correction does not involve the performance of judicial functions, but only the performance of a ministerial duty,⁴¹ as, for instance, where a board of supervisors makes a mathematical error in distributing the tax laid on bank stock.⁴²

§ 329 (4m) Injunctions to Restrain Assessment.—Where there is a disregard of the constitutional requirements and restrictions in the manner of assessment of banks, their property or stock, it is the power and duty of a court of equity to interfere by injunctive process.⁴³ Where the inequality

40. Pleading held fatally defective as joint petition.—*Kohler v. Feitner*, 71 App. Div. 572, 76 N. Y. S. 245.

41. Propriety of mandamus to correct assessment.—*Lawyer v. Board*, 39 Misc. Rep. 162, 79 N. Y. S. 145.

Where the supervisors of a county improperly taxed the bank stock of a city together with the other personal property in said city, in violation of Laws 1896, p. 806, c. 908, § 24, as amended by Laws 1901, p. 1350, c. 550, providing for separate assessment for the benefit of the city, a writ of mandamus will issue, directing the board of the succeeding year to convene and to issue forthwith, as directed by the charter of such city (Laws 1897, p. 458, c. 360, § 110), a certificate that the share of the state and county taxes to be raised in that city for the year 1906 is subject to the deduction of the amount illegally added to the tax by the improper assessment of the bank stock. Order, 50 Misc. Rep. 63, 100 N. Y. S. 330, affirmed. *Geneva v. Board*, 114 App. Div. 915, 100 N. Y. S. 1136.

A bank, assessed for the whole amount of its capital and surplus earnings, less 10 per cent thereof, after deducting therefrom the value of its real estate, applied for a mandamus to compel assessor to strike such assessment from the roll, on the ground that the bank owned securities of the United States to an amount exceeding its capital and surplus earnings, and that the total value of all its other personal property did not exceed the amount of its debts. Held, that the writ must

be denied, as it did not appear from the facts that any of the capital was invested in United States securities, or that it was assessed for any of its property invested in such securities. *People v. Board* (N. Y.), 46 Barb. 588.

42. Where a board of supervisors makes a mathematical error in distributing the tax laid on bank stock as directed by Laws 1901, c. 550, § 2, it acts ministerially, and mandamus will lie to correct the error. *Lawyer v. Board*, 39 Misc. Rep. 162, 79 N. Y. S. 145.

43. Injunction to restrain assessment.—Appeal of Banger, 109 Pa. 79.

Hurd's Rev. St. 1905, p. 1646, c. 120, §§ 27, 29, provides that in making up the amount of credits which any person is required to list for taxation he shall be entitled to deduct from the gross credits all bona fide debts shown by a verified list owing to any other person for a consideration received. Held, that where complainant alleged that he filed a sworn statement of credits and deductions, showing that the deductions to which he was entitled exceeded the credits by \$500, but notwithstanding this a deputy assessor illegally and without complainant's knowledge added to the schedule \$11,900 as credits of other than bank, banker, broker, or stock jobber, and that the item of \$11,900 was included in the credits listed in the statement of deductions, and that thereafter the board of review, over complainant's protest, raised his personal assessment an additional \$1,500 full value without showing on what the assessment was

arises from the misconduct of the officer, those whose property is assessed at a higher rate or valuation than the general mass of property may invoke the aid of the court to compel the taxing officer to reduce the excessive assessment to the same proportion of value as placed upon the general mass of property.⁴⁴ This rule applies where shares of bank stock are assessed at a value greater in proportion than that placed upon the general mass of taxable property.⁴⁵ It has been held that an injunction to restrain an assessor and collector of a county from making any new and additional assessment of the capital stock and property of the bank is improperly issued; for, until the assessment is made and a tax is levied, no one is injured and the suit will not lie, and until the assessment is made it can not be determined whether or not it is a proper one.⁴⁶

§ 329(4n) Actions to Reduce Assessment or Abate Tax.—Under a statute authorizing a trustee of an express trust to bring suit in his own name without joining the person for whose benefit the suit was brought, a national bank may bring suit for relief against an excessive tax on its stock without joining the stockholders, since a trust is imposed on the bank for the payment of such tax.⁴⁷ Where, in a suit by a national bank to require the state board of valuation and assessment to deduct the value of federal bonds held by it from an assessment for a given year, it does not claim that its shares were fixed at too high a valuation, nor show that it has attempted to obtain a reduction of the assessment, nor that any prejudicial error was committed in the manner of valuing the shares, except in failing to deduct the value of federal bonds, it is immaterial what information the board used in making the assessment.⁴⁸

§ 329 (4o) Actions to Set Aside Assessment or for Reassessment.—Where an assessment of national bank stock has been made in the wrong

made, the bill alleged facts entitling complainant to equitable relief. *Bates v. Parker*, 227 Ill. 120, 81 N. E. 334.

44. *First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

"A denial of such right results in inequality and a want of uniformity in the assessment and taxation. *Lively v. Missouri, etc., R. Co.*, 102 Tex. 545, 120 S. W. 852; *Raymond v. Chicago, Union Tract. Co.*, 207 U. S. 20, 52 L. Ed. 78, 28 S. Ct. 7; *Taylor v. Louisville, etc., R. Co.*, 31 C. C. A. 537, 88 Fed. 350; 37 Cyc. 737." *First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

45. *First Nat. Bank v. Christensen*, 39 Utah 568, 118 Pac. 778.

46. **Impropriety of injunction to restrain new and additional assessment.**—*First Nat. Bank v. Albright*, 13 N. Mex. 514, 86 Pac. 548, affirmed in 208 U. S. 548, 52 L. Ed. 614, 28 S. Ct. 349.

47. **Right of national bank to sue**

for relief against excessive tax.—*Citizens' Nat. Bank v. Columbia*, 23 Wash. 441, 63 Pac. 209.

48. *Hager v. Citizens' Nat. Bank*, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

In a suit by a national bank to require the state board of valuation and assessment to deduct the value of federal bonds held by it from an assessment on its shares for state taxes in 1906, it is immaterial in what manner local assessments were made in that year upon such shares for purposes of counties, etc., or when they were made or when the taxes were paid thereunder, since the state board, under the express terms of the act effective June 11, 1906 (*Laws 1906*, p. 134, c. 22, subd. 2), had no power to make assessments for counties, etc., and was limited solely to assessments for state purposes. *Hager v. Citizens' Nat. Bank*, 32 Ky. L. Rep. 95, 105 S. W. 403, 914.

district, the court may, in an action by the party aggregate to set aside the assessment, direct an assessment in the proper district to be made.⁴⁹

§ 330. Lien and Priority.—Where a state statute provides that all personal taxes shall become a lien on personal property on a certain day in each year, and shall take precedence of any sale, assignment, or chattel mortgage, levy, or other lien on such personal property executed or made after said date, except where such property is actually sold in the regular course of trade, such statute applies to shares of bank stock, as to other personality.⁵⁰ Where one in whose name bank stock has been taxed sells it, or mortgages it, for its full value, before personal taxes become a lien on personal property, the tax can not be collected of the purchaser or mortgagee.⁵¹ A suit to enjoin the collection of such tax of one who purchased the bank shares after taxation, because the purchase was before the tax became a lien on them, is not necessary, this being a matter which can be interposed as a defense in the action.⁵²

§ 331. Payment and Refunding or Recovery of Tax Paid—§ 331 (1) Payment—§ 331 (1a) In General.—**Duty of Bank to Pay Taxes on Shares of Stock.**—The power of the state to require a bank to pay the tax levied on shares of bank stock in the hands of stockholders has been treated elsewhere in this title.⁵³

Liability of Bank for Interest.—A bank is liable for only 6 per cent interest, after three months from a settlement of an account against a bank for unpaid taxes on dividends, where the case is tried on appeal therefrom to the common pleas, under the act of assembly of Pennsylvania.⁵⁴

§ 331 (1b) Mode of Making and Medium of Payment.—Where a county treasurer deposited the county funds in a bank, and used the bank as a medium for the collection of taxes, by placing tax receipts in its hands, and permitting it to collect the amount, and credit it to the deposit account, the delivery to the bank of a receipt for the amount of the taxes assessed against the bank, and a credit of the amount of such receipt to the deposit account, constituted, as between the county and the treasurer, a collection of the tax due from the bank.⁵⁵

§ 331 (1c) Operation and Effect of Payment.—In General.—A tax on the franchise of a national bank similar to that imposed on state

49. Direction of proper assessment in action to set aside assessment.—*Crossley v. East Orange*, 62 N. J. L. 583, 41 Atl. 712.

50. Priority of taxes on bank shares as a lien.—*St. Johns Nat. Bank v. Bingham*, 113 Mich. 203, 71 N. W. 588.

51. Effect of sale before tax becomes a lien.—*St. John's Nat. Bank v. Bingham*, 113 Mich. 203, 71 N. W. 588.

52. *St. Johns Nat. Bank v. Bingham*, 113 Mich. 203, 71 N. W. 588.

53. Payment of bank of taxes on shares of stock.—See ante, "Shares of Stock in Hands of Stockholders," § 326 (1d); post, "Validity of Statute Requiring Payment by Bank as Agent of Stockholders," § 326 (2bcd).

54. Liability for interest.—*Commonwealth v. Easton Bank*, 10 Pa. 442.

55. Credit of amount of bank's tax to county treasurer's deposit account as payment.—*Brown v. Sheldon State Bank*, 139 Iowa 83, 117 N. W. 289.

banks being void, a bank which paid such tax for a certain year should nevertheless list its property for that year, and be credited with the amount paid on the franchise tax.⁵⁶

Right as against Persons or Property Liable, of Bank Making Payment.—Where a bank pays taxes assessed on its stock as required by statute, its claim for reimbursement against the holders of stock is an asset of the bank, which it is entitled to collect.⁵⁷

Tax Receipts or Certificates and Estoppel Thereby.—Where the treasurer of the state received, by mistake, from a bank, a sum less than the amount of the tax, his receipt "in full for the semiannual tax on the capital stock of said bank, which became due" on a day stated, does not bar the state from recovering the just amount.⁵⁸

§ 331 (2) Tender.—In the case of assessment of taxes on the shares of a bank in the hands of the shareholders, the usual rule applies that the owner of taxable property who seeks to enjoin the collection of a tax thereon which he alleges to be in excess of what is lawful must first pay or tender so much thereof as is justly due.⁵⁹ Where, however, the original assessment was void, and has not been validated, there is no necessity for a tender on the part of the shareholders of such sum as might be equitably due on account of their taxes.⁶⁰ In case of tender of taxes due from a bank or upon bank stock, the general rule applies that, to make a tender valid, it must be so made that the party refusing it is in the wrong.⁶¹ The tender

56. Effect of payment of void franchise tax.—*Citizens' Nat. Bank v. Commonwealth*, 118 Ky. 51, 25 Ky. L. Rep. 2254, 26 Ky. L. Rep. 62, 80 S. W. 479, rehearing denied, 81 S. W. 686; *Farmers' Nat. Bank v. Commonwealth (Ky.)*, 90 S. W. 1193.

Overpayments of taxes made by a bank were properly credited, under the Hewitt bill, on a judgment in a proceeding to require the listing of the bank's property, though the auditor had already certified to the sheriff the amount due from the commonwealth, and directed that officer to credit it on whatever execution came to his hands; but the officer should not credit such payments a second time on the execution. *Citizens' Nat. Bank v. Commonwealth*, 118 Ky. 51, 25 Ky. L. Rep. 2254, 80 S. W. 479, rehearing denied 26 Ky. L. Rep. 62, 81 S. W. 686; *Farmers' Nat. Bank v. Commonwealth (Ky.)*, 80 S. W. 1193.

57. Right of bank making payment as against persons or property liable.—*Kennedy v. Citizens' Nat. Bank*, 128 Iowa 561, 104 N. W. 1021. See ante, "Shares of Stock in Hands of Stockholders," § 326 (1d); "Validity of Statute Requiring Payment by Bank as Agent of Stockholders," § 326 (2bcd).

Under Rev. Codes, § 1672, the shares of stocks in banks must be assessed against the owners and the tax paid by the bank. Held, that the liability of the bank to pay the tax carries with it an implied lien in favor of the bank against the stock and the dividends for reimbursement. *Shainwald v. First Nat. Bank*, 18 Iowa 290, 109 Pac. 257.

Where a bank paid taxes assessed on its stock, an individual stockholder could not maintain an action against the bank to recover his share of the bank's claim against the holders of the stock on which the taxes had been paid for reimbursement. *Kennedy v. Citizens' Nat. Bank*, 128 Iowa 561, 104 N. W. 1021.

58. Tax receipt to recovery of just amount.—*State v. Waldo Bank*, 20 Me. 470.

59. General rule as to necessity of tender.—*National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903.

60. Where original assessment void.—*Albany City Bank v. Maher*, 9 Fed. 884, 20 Blatchf. 341.

61. General rule as to manner and sufficiency of tender.—*State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703.

by a bank of a portion of a tax, on condition that it be received in full satisfaction, does not relieve the bank from penalties on the whole for nonpayment.⁶²

§ 331 (3) Recovery of Taxes Paid—§ 331 (3a) In General.—

In the case of banks, as of natural persons or other corporations, it would seem that payment of a tax without legal duress of person or property must be considered as voluntary, and it can not be recovered back.⁶³ A state tax, assessed on the shareholders of a national bank under the act of 1865, and voluntarily paid, though under protest, can not be recovered back on the ground that the mode of assessment provided by that act was illegal.⁶⁴ When a receiver of a bank pays taxes assessed against it, believing that the taxes were properly assessed against the bank instead of against the stockholders, he is bound by such act, whether it was right or wrong, as it was money paid under mistake of law, and can not be recovered.⁶⁵ Where assessors have jurisdiction of a person or corporation subject to taxation, and have a description of the amount and value of the property belonging thereto, but commit an error in determining what portion of the property is liable to taxation, the error is a judicial one and may be reviewed on certiorari, but an action will not lie to recover back money paid on such erroneous assessment.⁶⁶ The cashier of a national bank may act as the agent of the bank in listing its property for taxation, but he has no authority to list the capital stock for assessment against the bank, and the mistake of the cashier in listing the capital stock will not estop the bank from recovering the taxes paid under protest on such void assessment.⁶⁷ Taxes on bank stock owned by a nonresident insurance company being void, the company's personal property being exempt (Act June 15, 1886, § 4), and the tax officers not having acquired jurisdiction of the company, may be recovered by the company from the dividends on the company's stock, this not being a voluntary payment by the company.⁶⁸ A bank is not prevented from prosecuting an action to recover taxes paid on its reserved profits under protest by Pub. St. c. 43, §§ 6, 7, which provide that whoever neglects to make return of his ratable property shall have no remedy if overtaxed, since the tax thereon was not an overtax, but a void tax.⁶⁹ Where a statute curing an imperfect assessment of bank stock, is not an ordinary curative

62. Effect of conditional tender of portion of tax as relieving from penalties on whole for nonpayment.—*State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703.

63. General rule as to recovery back of voluntary payment.—*Bank v. Chalfant*, 52 Cal. 170; *Wills v. Austin*, 53 Cal. 152; *Merrill v. Austin*, 53 Cal. 379.

64. *People v. Miner*, 46 Ill. 374.

65. Recovery of taxes paid under belief that same were properly assessed.—*Bristol v. Morganton*, 125 N. C. 365, 34 S. E. 512.

66. Money paid on erroneous assessment.—*Genesee Valley Nat. Bank v. Livingston* (N. Y.), 52 Barb. 223.

67. Effect of mistake of cashier in listing capital stock of bank.—*Weiser Nat. Bank v. Jeffreys*, 14 Idaho 659, 95 Pac. 23.

68. Where tax void.—*Ætna Ins. Co. v. New York*, 14 Misc. Rep. 145, 35 N. Y. S. 857, 70 N. Y. St. Rep. 364, affirmed in 7 App. Div. 145, 40 N. Y. S. 120.

69. *Mechanics' Sav. Bank v. Gran-ger*, 17 R. I. 77, 20 Atl. 202.

statute, legalizing the assessment as of the date it was originally laid, but only makes it a legal assessment as of the time steps therefor are taken under the statute; so that, the taxes having been paid, interest thereon may be recovered from the time of payment to the time of the validating of the assessment.⁷⁰

§ 331 (3b) Actions and Proceedings for Recovery of Taxes Paid.—Conditions Precedent.—In order that taxes paid by a bank or on bank stock may be recovered back in an action, all statutory requirements imposing conditions precedent must have been complied with, as, for instance, previous application to the proper tribunal for relief,⁷¹ demand for a refunding, etc.⁷²

Who Entitled to Sue.—It would seem that where a bank has paid taxes on shares of its stock, an action to recover the payment may be maintained either in the name of the bank, without joining the stockholders,⁷³ or by a stockholder.⁷⁴ It has been held in an action by a national bank to recover taxes paid by it on its real estate, its capital stock having been assessed without any deduction therefor, that the wrong, if any, was done to the stockholders in overvaluing their stock, and not to the bank in assessing its real

70. Recovery of interest from time of payment till assessment validated.—*Merchants' Nat. Bank v. Purdy*, 143 App. Div. 277, 128 N. Y. S. 119.

71. Application to proper tribunal for relief.—A nonresident bank, which holds stock in a bank within the state, can not, in a collateral proceeding, recover back a tax levied on such stock, and paid by the latter bank, and charged to it on the ground that it had no taxable surplus, where it failed to apply to the tax commissioners for a deduction, unless it was evident that such application would be vain. Judgment 37 App. Div. 560, 56 N. Y. S. 295, affirmed. *Citizens' Sav. Bank v. New York*, 166 N. Y. 594, 59 N. E. 1120.

An action by a bank against a city to recover taxes paid, on the ground that United States bonds owned by the bank had been assessed, was one which the courts would not entertain; no complaint having been made by plaintiff to the proper officers within the time prescribed by law. *Grayson County Nat. Bank v. Leitchfield (Ky.)*, 114 S. W. 289.

72. Demand for refunding.—A receiver of a bank can not recover for the payment of a tax assessed against it, on account of alleged irregularities in the assessment, unless he has complied with Laws 1897, c. 169, § 79, requiring that the party paying an illegal tax shall make demand within thirty days thereafter, and, if it is not

refunded within ninety days, he shall bring suit. *Bristol v. Morganton*, 125 N. C. 365, 34 S. E. 512.

73. Action in name of bank.—*State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A., N. S., 663.

74. Right of stockholders to recover.—A bank, in an attempt to comply with the law requiring it to collect the tax due on the shares of its stock from the owners thereof and to pay the same to the receiver of taxes, paid a tax on the shares from moneys held by it for distribution among its stockholders as dividends. Held, that the payment was a payment out of the property of the stockholders, authorizing a stockholder to recover from the municipality the tax paid on his shares, on it being shown that the tax was void and the payment by the bank unauthorized. *Guaranty Trust Co. v. New York*, 108 App. Div. 192, 95 N. Y. S. 770.

Where a bank is required by law to retain from the earnings of its shares of stock a sufficient sum to pay taxes thereon assessed against the stockholders, the bank is thereby constituted the agent of the stockholders to pay any legal tax assessed against the stock; but payment of an illegal tax is not within the agency, and therefore a stockholder may recover it as money paid out to his use. *Ætna Ins. Co. v. New York*, 7 App. Div. 145, 40 N. Y. S. 120, 74 N. Y. St. Rep. 677.

estate to it, and hence that the bank could not recover.⁷⁵

§ 331 (4) Release or Abatement, Rebates and Discounts.—Remission or Release of Tax by Legislative Act.—A judgment was recovered by the commonwealth against a bank for the semiannual tax payable in April, 1838, but, before the execution issued thereon was levied, a resolve was passed by the legislature providing that the tax on such bank, “due to the commonwealth from the 29th day of January, 1838, be remitted,” upon the payment by the bank of the costs incurred for the recovery thereof. Held, that the whole of such semiannual tax was not released by the resolve, but only such a part thereof as bore the same proportion to the whole which the time between the 29th of January and the day when such tax was due bore to the period of six months.⁷⁶

§ 332. Collection and Enforcement—§ 332 (1) Manner—§ 332 (1a) In General.—A collection of a tax on the shares of a national bank, like that of all other taxes duly assessed, is to be enforced in accordance with the general laws of the state.⁷⁷

§ 332 (1b) Summary Remedies.—In many of the states provision is made for the collection of taxes on shares of bank stock in a summary method, as by way of rule against the stockholders to produce their shares in order that they may be sold for the payment of taxes claimed to be due thereon,⁷⁸ or by the issuance of execution.⁷⁹ In New York express provision is made for the enforcement of payment of taxes on shares of bank stock owned by nonresidents by a lien on and sale of the stock.⁸⁰ Where a bank is not made a party to a rule against the stockholders to surrender their shares to be sold for taxes due thereon, neither service on the cashier of a copy of the rule, nor of a notice by the collector to surrender shares

75. Burns' Rev. St. 1894, §§ 8411, 8421, 8460, 8470-8473, require shares of capital stock of a national bank to be assessed to the stockholders, and provide that the value of any real estate acquired by the bank shall be deducted from the valuation of the capital stock. Section 8431 requires the assessment of real estate in the place where situated, and to the owner, if known. Rev. St. U. S., § 5119, authorizes the assessment of national bank stock by the state, and the assessment of bank real estate in the same manner as other real estate. Held, in an action by a national bank to recover taxes paid by it on its real estate, its capital stock having been assessed without any deduction therefor, that the wrong, if any, was done to the stockholders in overvaluing their stock, and not to the bank in assessing its real estate to it, and hence that the bank

could not recover. *Board v. First Nat. Bank*, 25 Ind. App. 94, 57 N. E. 728.

76. **Remission or release by act of legislature.**—In re *Kilby Bank* (Mass.), 23 Pick. 93.

77. **Enforcement in accordance with general laws of state.**—*Weld v. Bangor*, 59 Me. 416.

78. **Proceedings by way of rule for sale of stock.**—*Parker v. Shareholders*, 49 La. Ann. 105, 21 So. 232.

79. **Issuance of executions.**—Where stock was properly returned by a bank to the tax receiver, the stockholder being liable to pay the tax, the collector could issue executions therefor. *Burke v. Speer*, 59 Ga. 353.

80. **Enforcement of payment of tax on bank stock owned by nonresidents.**—*New York v. McLean*, 170 N. Y. 374, 63 N. E. 380, affirming 57 App. Div. 601, 68 N. Y. S. 606.

liable for taxes, is legal service on the bank.⁸¹ A statute declaring that a bank shall pay the taxes of its stockholders assessed on its stock, but that, if a bank shall not pay such taxes, the individual stockholders shall be liable therefor, do not authorize a levy of tax warrants against the property of a bank to compel the payment of taxes due from delinquent stockholders.⁸² Where a warrant attached to an assessment against a stockholder in a bank for the amount of his stock directs the collector to collect from the persons named, and to levy the same of their goods and chattels, the collector is not authorized to levy upon and collect the same of the property of the bank, although the bank holds funds with which the tax should have been paid. The contract between the bank and its stockholders can not thus be enforced.⁸³ Assessments of national bank stock should be made against the shareholders personally. And the collector has no right to collect the tax by selling the property of the bank, or the shares or other property of the shareholders, except that of the delinquent.⁸⁴ Where an act of a state legislature provides for the taxation of the shares of a national bank, and that the taxes against such shares shall be levied against the holder of the same in the list of personal property, the legislature has power to provide that the taxes "shall be paid by the bank," and in the collection of such tax the collector may make distress of the property of the bank.⁸⁵

§ 332 (1c) Actions for Unpaid Taxes—§ 332 (1ca) In General.

—In the absence of statute authorizing it, it would seem to be the general rule that an action will not lie to recover unpaid taxes, and this rule is alike applicable to taxes levied on banks or bank stock as to those levied on other corporations or natural persons.⁸⁶ In a number of jurisdictions, however, such actions are expressly authorized.⁸⁷ Such actions being statutory, they

81. Service of rule or notice on cashier of bank.—*Parker v. Shareholders*, 49 La. Ann. 105, 21 So. 232.

Service of a rule against stockholders to produce their shares to be sold for taxes, made "on the shareholders * * * by leaving the copy in the hands of the cashier," and followed by a service on the bank of a notice to deliver up to the state collector shares of the capital stock liable for state taxes, was insufficient to make the bank a party to the rule, where the rule itself was silent as to the bank. *Parker v. Shareholders*, 49 La. Ann. 105, 21 So. 232.

82. Property subject to seizure and sale.—*First Nat. Bank v. Lyman*, 59 Kan. 410, 53 Pac. 125, reversing *Lyman v. First Nat. Bank*, 6 Kan. App. 74, 40 Pac. 639.

83. *First Nat. Bank v. Fancher*, 48 N. Y. 524.

84. *First Nat. Bank v. Meredith*, 44 Mo. 500.

85. *First Nat. Bank v. Douglas*, Fed. Cas. No. 4,799, 3 Dill. 330.

86. Action not maintainable in absence of statute.—*Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605; *Shearer v. Citizens' Bank*, 129 Iowa 564, 105 N. W. 1025; *Board v. First Nat. Bank*, 48 Kan. 561, 30 Pac. 22.

In the absence of statute, no action at law will lie to recover taxes whether on omitted property or otherwise. *Shearer v. Citizens' Bank*, 129 Iowa 564, 105 N. W. 1025.

87. Actions authorized by statute.—*Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605; *Shearer v. Citizens' Bank*, 129 Iowa 564, 105 N. W. 1025; *Board v. First Nat. Bank*, 48 Kan. 561, 30 Pac. 22; *McLean v. Myers*, 134 N. Y. 480, 32 N. E. 63.

The fact that The Banking Act (Laws 1882, c. 409), § 312, which subjects bank stock to taxation at the place where the bank is located, pro-

can not be maintained unless the statute has been substantially complied with.⁸⁸

§ 332 (1cb) Defenses.—Where a tax assessment is made against the corporation bank, at a time when the law requires the bank's property to be assessed against its stockholders, the collector can not recover in a suit for taxes against the bank, on a tax bill charging the corporation for the taxes.⁸⁹ Nor is the bank's right to dispute the payment of such tax bill cut off by the fact that it did not appeal from the county board of appeals. No appeal lies from the action of the board of appeals in any case.⁹⁰ A suit to compel

vides for the collection of the tax by means of a proceeding in rem against the stock itself, or by means of a warrant to be issued against nonresidents by the collector or county treasurer, does not exclude an action by the tax receiver under § 863 of the consolidation act, as the remedies furnished by The Banking Act, standing alone, are not adequate. *McLean v. Myers*, 134 N. Y. 480, 32 N. E. 63.

Since Laws 1882, c. 410 (Consolidation Act), § 863, which provides that any delinquent personal property tax duly imposed on any person or corporation in the city and county of New York may be recovered by the receiver of taxes in an action in any court of record within the state, does not expressly exclude from its operation nonresidents assessed under The Banking Act (Laws 1882, c. 409) on shares of stock in banks located in the city of New York, they will not be excluded by implication. *McLean v. Myers*, 134 N. Y. 480, 32 N. E. 63.

Statute held not to impose personal liability on nonresident taxpayer.—Rev. St. U. S., § 5219, authorizes the taxation of shares in national banks, and gives state legislatures power to determine the method to be followed. Laws 1882, c. 409, § 312, provides for a taxation of such shares of a nonresident in the state at the place where the bank is located, and to enforce the payment by a lien on and sale of the stock. New York City Charter (Laws 1897, c. 378, § 936) provides that any tax for personal property on any person or corporation in the city of New York, which is in default, may be recovered by an action in any court of record in the state. Held not to impose on a nonresident taxpayer a personal liability for a tax, but only to make the property liable therefor. Order, 57 App. Div. 601, 68 N. Y. S. 606, affirmed. *New York v. McLean*, 170 N. Y. 374, 63 N. E. 380.

In an action against a nonresident stockholder to recover for an unpaid assessment on national bank stock, personal service was had within the state. Held not to render him personally liable on such judgment. Order, 57 App. Div. 601, 68 N. Y. S. 606, affirmed. *New York v. McLean*, 170 N. Y. 374, 63 N. E. 380.

Section 863 of the New York City Consolidation Act, providing for the collection of any tax imposed for personal property upon any person in the city and county of New York, by action by the receiver of taxes, does not authorize an action against a resident of another county of the state for a tax assessed in the city and county of New York on stock in a bank standing in the name of such person, but for which no warrant has been issued to a marshal of the city, as ample provision for the collection of such taxes on bank stock of nonresident holders, by other proceedings, has been made by other statutes, and the only action given to the receiver of taxes is an action in rem, under § 314 of The Consolidation Act, to "collect the tax from the avails of the sale" of the stock. *McLean v. Myers*, 11 N. Y. S. 635, 33 N. Y. St. Rep. 802, 58 N. Y. Super. Ct. 337.

88. Necessity for statutory compliance with statute.—*Judy v. National State Bank*, 133 Iowa 252, 110 N. W. 605.

89. Defenses.—*State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

90. State v. Merchants' Bank, 160 Mo. 640, 61 S. W. 676.

In an action against a bank on a tax bill for taxes which should have been assessed against the stockholders, and not against the bank, a claim that as the bank president appeared before the county board of appeals and objected to the amount of the assessment, and not to the manner of it, the defendant should have appealed

payment of a tax can not be defended on the ground that the national bank stock on which it was levied was not taxable on account of its being pledged as security, the remedy being by appeal from the assessment.⁹¹

§ 332 (1cc) Time to Sue and Limitations.—As to the time when the right of action for unpaid taxes against property or shares of a bank accrues, and the time within which such action must be brought, no definite rule can be laid down, as these matters depend upon the statutory provisions in the different states.⁹²

§ 332 (1cd) Parties.—A statute requiring actions to be brought in the name of the real party in interest has been held to apply to proceedings to enforce collection of taxes against banks or bank shares.⁹³ Under a statute, § 33, providing that, when a tax is assessed upon shares of capital stock of any bank, the treasurer shall demand payment thereof of the cashier of such bank, and thereupon it shall be the cashier's duty to pay the same, an action to collect a tax assessed against a bank stockholder, upon the cashier's refusal to pay, can not be brought against the cashier, it being the bank's duty to pay such tax.⁹⁴

from the action of the board if it was not satisfied with it, was without merit, since no appeal lies from the board of appeals. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

91. *Farmington v. Downing*, 67 N. H. 441, 30 Atl. 345.

92. **Accrual of right of action.**—St. 1828, c. 96, § 21, and Rev. St., c. 9, § 1, provide that every bank (shall within ten days after the first Monday of April and October, in each year, pay a certain tax on the amount of its capital stock actually paid in, and that, if any part of the capital stock shall have been paid in within six months previous to said days, the tax thereon shall be paid in proportion to the time that shall have elapsed after such payment. Held, that an action of debt might be brought under Rev. St., c. 9, § 3, to recover such tax immediately after the expiration of the ten days, although St. 1830, c. 58, renewing the charter of such bank, made it subject to St. 1828, c. 96, which provided that, if any bank tax remained unpaid for thirty days, the treasurer of the commonwealth should issue his warrant of distress therefor. *Commonwealth v. Commonwealth Bank (Mass.)*, 22 Pick. 176. See Gen. St., c. 57, § 89.

Limitations of actions.—Acts 1900, p. 65, c. 23, relative to taxation of national bank stock, does not give the commonwealth a new cause of action, but a new remedy for the collection

of taxes on national bank stock, so that in an action under the act against a national bank the statute of limitations is a bar to all recovery for taxes accruing more than five years before the institution of the action. *Rehearing*, 118 Ky. 51, 25 Ky. L. Rep. 2254, 80 S. W. 479, denied. *Citizens' Nat. Bank v. Commonwealth*, 118 Ky. 51, 25 Ky. L. Rep. 2254, 26 Ky. L. Rep. 62, 80 S. W. 479, 81 S. W. 686.

93. **Application of rule requiring action to be in name of real party in interest.**—Where a county levied a tax to meet outstanding warrants, a bank, to which the tax and warrants had been assigned, was not the proper party to bring proceedings to enforce collection of the tax, under Rev. St. 1889, §§ 540, 541, requiring actions to be brought in the name of the real party in interest, as the statute requires that state and county taxes be sued for in the name of the state at the relation and to the use of the collector of the county. *Hill v. Wabash R. Co.*, 169 Mo. 563, 70 S. W. 132; *Hill v. Atchison, etc., R. Co.*, 169 Mo. 578, 70 S. W. 1118.

94. *Muskegon v. Lange*, 104 Mich. 19, 62 N. W. 158.

St. 1828, c. 96, § 21, and Rev. St., c. 9, § 1, provide that every bank shall, within ten days after the first Mondays of April and October, in each year, pay a certain tax on the amount of its capital stock actually paid in, and that, if any part of the capital

§ 332 (1ce) Pleading.—In an action against a bank to collect taxes, a claim that United States bonds held by the bank were exempt should be set up in the answer, instead of the rejoinder, since it was a defense pro tanto to the cause of action set up in the petition.⁹⁵

§ 332 (1cf) Evidence.—In actions to enforce the collection of taxes against banks or on shares of their stock, the usual rules as to admission and exclusion of evidence,⁹⁶ and the weight and sufficiency of evidence in actions generally, would seem to apply.⁹⁷

§ 332 (2) Remedies for Wrongful Enforcement—§ 332 (2a) Injunction—§ 332 (2aa) When Proper.—With regard to the propriety of injunction as a remedy for the wrongful enforcement of a tax against banks or shares of bank stock, the usual rule applies that it is only where a tax is void or voidable that a court of equity will interfere to prevent its collection.⁹⁸ The remedy for all other wrongs and errors in the assessment or levy must be sought at the hands of the taxing officers, or by appeal therefrom in the manner provided by statute.⁹⁹ There must be special

stock shall have been paid in within six months previous to "said days," the tax thereon shall be paid in proportion to the time that shall have elapsed after such payment. Held, that an action of debt under Rev. St., c. 9, § 2, to recover such tax immediately after the expiration of the ten days, should be brought against the corporation, and not against the directors. *Commonwealth v. Commonwealth Bank* (Mass.), 22 Pick. 176.

95. Pleading—Claim of exemption proper for answer rather than rejoinder.—*Citizens' Nat. Bank v. Commonwealth*, 32 Ky. L. Rep. 1116, 108 S. W. 231.

96. Evidence held admissible.—In an action against the "Merchants' Bank of Jefferson City, Missouri," on a tax bill made out against the "Merchants' Bank," it was not error to admit the tax bill in evidence, since as the words, "of Jefferson City, Missouri," were merely descriptive of the bank, and not part of its name, the bill was properly made out. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

In an action against a bank on a tax bill, it was error to exclude evidence that the taxes for that year had been paid prior to the commencement of the action. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

In an action against a bank on a tax bill, it was error to exclude evidence that it was bank stock which was assessed, since as bank stock should be assessed to the stockholders, and not to the bank, such evidence

showed a defense to the action. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

97. Tax bill held not to establish prima facie case.—Where, in an action against a bank on a tax bill, the tax book showed that the assessment was erroneously made against the bank instead of against its stockholders, the tax bill did not establish a prima facie case. *State v. Merchants' Bank*, 160 Mo. 640, 61 S. W. 676.

98. General rule as to propriety of relief by injunction.—*Carpenter v. Jones*, 130 Iowa 494, 107 N. W. 435.

99. Carpenter v. Jones, 130 Iowa 494, 107 N. W. 435.

Where the assessor made an unauthorized assessment of the shares of bank stock to the bank, and the bank did not ask the board of equalization to correct such erroneous assessment, it could not enjoin the collection of the taxes, in the absence of a valid excuse for its failure to apply to such board. *First Nat. Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83.

Where a national bank, through its proper officers, voluntarily lists its stockholders' shares as the property of the bank for taxation, and the taxing officers tax the same in the name of the bank, equity will not relieve the bank from the payment of such tax by enjoining its collection, in the absence of application to all the statutory tribunals authorized to hear such matter and determine and grant the proper relief. *Albuquerque Nat. Bank v. Perea*, 5 N. Mex. 664, 25 Pac. 776.

circumstances which bring the case within some recognized ground of equity jurisdiction, and render such relief necessary to the adequate protection of the complainant's rights.¹ There must either be no legal remedy, or such remedy must be inadequate,² and it must appear that the act which

1. *People's Nat. Bank v. Marye*, 107 Fed. 570, modified and affirmed 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

2. **Remedy at law, if any, must be inadequate.**—*People's Nat. Bank v. Marye*, 107 Fed. 570.

Rev. St. 1889, §§ 7520, 7572, providing that one feeling himself aggrieved by an assessment may appeal from the assessor to the county board of equalization, give a remedy at law for such grievance, and an action will not lie in equity to enjoin the collection of the taxes; and it is immaterial that the assessment complained of violates the federal statutes forbidding a discrimination between a tax on national bank shares and a tax on moneyed capital in the hands of citizens. *National Bank v. Staats*, 155 Mo. 55, 55 S. W. 626.

Rev. St. U. S., § 5219, prohibiting an assessment of national bank stock at a greater rate than assessments against other moneyed capital, does not authorize suit to enjoin the collection of taxes assessed on the stock of a national bank in excess of taxes assessed on land of equal value, where the remedy at law provided by the statute was adequate, though such remedy may have been lost by lapse of time. *Mercantile Nat. Bank v. New York*, 27 Misc. Rep. 32, 57 N. Y. S. 254.

A circuit court sitting in equity will not enjoin the collection of taxes from a bank because its shares of stock were irregularly returned in the name of the bank, instead of in the names of the stockholders, where the statutes of the state provide an adequate remedy for the correction of the error. *Robinson v. Wilmington*, 13 C. C. A. 177, 65 Fed. 856.

A charge in a bill to restrain the collection of a tax on shares of bank stock which the complainant alleged did not belong to him, and which the supervisors assessed to him notwithstanding notice of its transfer to his sons, that the supervisors acted fraudulently in making and afterwards refusing to correct his assessment, will not confer jurisdiction in equity where it does not further appear that adequate relief is not practicable in a court of law. *Hagenbuch v. Howard*, 34 Mich. 1.

Where personal property sufficient in amount has been levied on to satisfy a tax on bank stock, which is claimed to be illegal and void, the remedy at law is adequate. An action of trover for the value of the property seized would raise the question, or complainant might pay the amount of the tax under protest, and afterwards test the validity of the tax in an action to recover back the amount paid, and injunction will not lie to restrain the collection. *Hagenbuch v. Howard*, 34 Mich. 1.

A distraint by a treasurer, against the money and property of an incorporated bank, can not be enjoined in chancery. If the act imposing the tax is unconstitutional, the treasurer is a trespasser, and is liable at law. *Mechanics', etc., Bank v. Debolt*, 1 O. St. 591.

Under Code, § 219, allowing an injunction when it appears by the complaint that plaintiff bank is entitled to the relief demanded, a bill will not lie to restrain the collection of an alleged illegal tax and for leave to pay the valid tax, as there can be no need of an order for the bank to pay the tax which is due, and if more be then unlawfully collected, the bank will have its remedy for the excess. *Chemical Bank v. New York* (N. Y.) 12 How. Prac. 476.

In a state where payment of taxes is held to be voluntary unless made under duress of a distraint, it would seem that the right of action to recover back a tax levied against a bank is an inadequate remedy, in view of the interference with its business and the injury to its credit which would be caused by a distress upon its personal property. *Decree Bank v. Stone*, 88 Fed. 383, affirmed. *Stone v. Farmers' Bank*, 174 U. S. 409, 43 L. Ed. 1027, 19 S. Ct. 880.

A national bank or stockholder therein has the right to go into a federal court of equity to test the validity, under Rev. St., § 5219 (U. S. Comp. St. 1901, p. 3502), of a tax levied by state authority on the stock of the bank, where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the

it is sought to restrain would work great or irreparable injury to the party applying for relief.³ An injunction is proper to restrain the collection of an illegal tax,⁴ where there is no adequate legal remedy and the threatened injury is irreparable,⁵ in the case of excessive or unequal assessments, or

state statute. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

An injunction will be granted to enjoin the collection of an illegal tax against a bank, as an action of trespass is not an adequate remedy where the funds are annually and unlawfully abstracted. *Woolsey v. Dodge*, Fed. Cas. No. 18,032, 6 McLean 142.

Where taxes are wrongfully assessed against shares of stockholders in a national bank, and demanded of the bank, it can sue to enjoin the collection of the tax, as, owing to the complications that would arise between it and its stockholders, the remedy at law is inadequate. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903; *Covington City Nat. Bank v. Covington*, 21 Fed. 484.

Where it appears that all affidavits and demands for deduction which could have been made would have been disregarded, and that the assessors had a fixed purpose, generally known to all persons interested, that no deduction for debts would be made in the valuation of bank shares for taxation, it was not essential, in order to sustain an injunction to restrain the collection of a tax, to show such affidavit and demand when it was established that there were debts to be deducted. *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. Ed. 1052.

3. Relief must be necessary to prevent great or irreparable injury.—Injunction by a bank authorized under Act Cong. June 3, 1864, to restrain the collection of taxes, is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief. *First Nat. Bank v. Meredith*, 44 Mo. 500.

A suit by a bank organized under Act Cong. June 3, 1864, to enjoin the collection of taxes assessed against itself on its bank stock, has no equity, as the bank as a corporation will lose nothing if the shares of its shareholders are sold. *First Nat. Bank v. Meredith*, 44 Mo. 500.

4. Illegal tax.—Where, under no theory, could there be a legal assess-

ment of the shares of stock of a national bank which held United States bonds exceeding in value its capital stock, surplus, and undivided profits, injunction was the proper remedy to restrain the collection of a tax levied. *Citizens' Nat. Bank v. Murrow* (Iowa), 133 N. W. 769.

A state law imposing a tax on the Bank of the United States was unconstitutional, and any attempt on the part of the officers of the state to enforce such tax against the property of the bank might be restrained by injunction from a circuit court of the United States. *Osborn v. Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204.

A suit may be maintained by a national bank on behalf of the shareholders to enjoin state officers from the collection of a state tax on the shares of the bank, on the ground of an illegal assessment arising from the failure to deduct from the valuation the debts owed by the shareholders. *Hills v. National Albany Exch. Bank*, 12 Fed. 93.

A state can not tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the circuit court. *Osborn v. Bank* (U. S.), 9 Wheat. 738, 6 L. Ed. 204.

5. A federal court will not enjoin the collection of taxes levied under the authority of a state upon the shares of a national bank, unless it clearly appears not only that the tax is illegal, but also that there are special circumstances which bring the case within some recognized ground of equity jurisdiction, and render such relief necessary to the adequate protection of the complainant's rights. *People's Nat. Bank v. Marye*, 107 Fed. 570. Modified and affirmed in 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

"In addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisprudence, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose

valuations;⁶ where property not liable is assessed;⁷ to avoid multiplicity

by injunction to stay the collection of a tax." *People's Nat. Bank v. Marye*, 107 Fed. 570.

6. Excessive or unequal assessment or valuation.—*National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

A tax founded on an assessment which from corrupt and malicious motives is excessive or is rendered unequal by fraudulent practices of the officers may be enjoined. *First Nat. Bank v. Holmes*, 246 Ill. 362, 92 N. E. 893.

If, by resolution adopted by township and city assessors, realty in the county was assessed at 25 per cent of its cash value and personalty, including the capital stock and surplus of national banks at forty per cent of their cash value, and the banks tendered to the county treasurer, the full amount of the state taxes and the amount it claimed was due the county, based upon a proper valuation, and averred a willingness to pay whatever sum the court should determine to be their valid share of taxes, the banks would be entitled to equitable relief. *Citizens' Nat. Bank v. Board*, 83 Kan. 376, 111 Pac. 496.

Where the Corporation Commission in performing its duty imposed by Pub. Laws 1909, c. 440, § 33, in assessing the value of bank stock, bases the estimated value of the stock by including in the surplus of the bank state bonds held by it, and thus increases the value of the stock, the bank or the stockholders may institute injunction proceedings. *Parker v. Raleigh Sav. Bank*, 152 N. C. 253, 67 S. E. 492.

Where national bank stock was assessed in a county at an 85 per cent valuation while all the other property subject to taxation was assessed at a 41 per cent valuation, there was inequality of taxation as to the bank stock, and the owners thereof might sue to enjoin the collection of a tax based on the excessive valuation. *Langley v. Smith* (Tex. Civ. App.), 126 S. W. 660.

Where there is a systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while the shares of a national bank are assessed at their full value, in violation of the act of congress which prescribes the rule by which they shall be taxed by state authority, on a tender of the sum which such shares ought to pay under the rule

established by such act, a court of equity will enjoin the state authorities from collecting the remainder. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. Ed. 901.

When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903, affirming *Merchants' Nat. Bank v. Cumming*, Fed. Cas. No. 9,453.

A bank whose capital stock is assessed at full value, while all other property is assessed at less than half value, may obtain relief in equity by enjoining collection of the excess. *Merchants' Nat. Bank v. Cumming*, Fed. Cas. No. 9,453, affirmed *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903.

Where the taxing officials assess all personal property at six-tenths of its actual value, but national banks are assessed at a larger per centum of the actual value of their shares, the collection of the excess will be restrained; and this, although the excess is imposed by a state board of equalization in its attempts to equalize the national banks among themselves throughout the state, or to equalize all "incorporated banks," state and national. *First Nat. Bank v. Treasurer*, 25 Fed. 749.

Where the state board of equalization for the "incorporated banks" of the state attempts to equalize the national banks in one class inter sese, and the state banks in a separate class inter sese, but adopts one standard of percentages for the state banks and another standard for the national

7. Assessment of property not liable.—Where a bank, under the law, is not liable at all to taxation on its personal property, and the levy is made in such a way as to directly interfere with its business, equity will interfere, by injunction, to restrain the enforcement of the tax. *Lenawee County Sav. Bank v. Adrian*, 66 Mich. 273, 33 N. W. 304.

banks, if the result be an assessment of the national banks at a higher valuation, comparatively, than the others, and if it produces an injurious discrimination, by assessing plaintiff's shares at a valuation higher than other moneyed capital, the excessive taxation will be restrained. *First Nat. Bank v. Treasurer*, 25 Fed. 749.

Failure to exhaust the remedy afforded by the laws of Washington for equalization of assessments does not preclude a national bank from obtaining relief, in a federal court, against the collection from it of taxes on its stock, on the ground of unjust discrimination in the valuation of stock. *First Nat. Bank v. Hungate*, 62 Fed. 548.

Facts held not to show excessive assessment or discrimination.—S., while doing business as a private banker with a nominal capital of \$10,000, and while in fact insolvent, listed his taxable moneys and credits for 1904 at \$11,000, to conceal his real financial condition. Taxes were levied on this sum, and after an assignment for the benefit of creditors, an inventory of the estate disclosed assets of about \$150,000 as against an indebtedness of more than \$180,000. Held, that, as the right to offset debts against credits was a personal privilege, it not being claimed that any creditor had any knowledge of the assessment until after the failure of the bank or that any person was misled to his injury, the assignee was not entitled to restrain the collection of the tax. *Carpenter v. Jones*, 130 Iowa 494, 107 N. W. 435.

An illegal discrimination by the assessors in assessing all other personal property in a county at only one-third of its actual value, instead of at its true value as required by statute, and assessing moneys, credits, and shares in national banks at their full value, does no invalidate all the taxes founded on such illegal assessment, nor authorize an injunction to restrain the collection of two-thirds of the taxes levied on moneys, credits, and shares in national banks. *Adams v. Beman*, 10 Kan. 37.

Equity will not restrain the collection of a tax on national bank stock imposed by New York City, though the stock was assessed at its actual value, while real estate was assessed at only 60 per cent, although the grievance can not, under Laws 1882, c. 410, §§ 819-821 (§ 821 having been amended by Laws 1885, c. 311), be reached by certiorari, and no other legal remedy

exists; it being presumed, in the absence of evidence, that the taxing officers acted honestly and impartially, and with no intention to unjustly discriminate, and the valuable as fixed by them being uniform with respect to each class of property. Judgment, 50 App. Div. 628, 63 N. Y. S. 1111, affirmed. *Mercantile Nat. Bank v. New York*, 172 N. Y. 35, 64 N. E. 756.

In a suit to enjoin the collection of taxes on national bank stock on the ground that the assessment was so excessive, as compared with that assessed on other moneyed capital, as to amount to an illegal discrimination, evidence considered, and held not to show discrimination. *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

A bank whose stock was assessed on the same basis as other personality in the township is not entitled to enforce a reduction to the lower basis of valuation fixed for real estate; his remedy being to enforce valuation on a uniform basis. *First Nat. Bank v. Holmes*, 246 Ill. 362, 92 N. E. 893.

The collection of a tax assessed under a state statute, upon national bank shares, can not be enjoined on the ground that the tax is at a greater rate than upon other moneyed capital, where the statute provides that the shares shall be assessed according to their actual value; and in arriving at that value the liabilities of the bank are deducted from its credits, and the shareholders thus given the benefit of the reduction, the value of the shares being decreased to an extent proportionate to the liabilities of the bank; and, if the claim of plaintiff is that his individual debts should be taken from the value of his shares, he should show that he owes such debts; otherwise the tax is valid as to him. *Rosenberg v. Weekes*, 67 Tex. 578, 4 S. W. 899.

Under the law of New Mexico, which requires property to be assessed at its cash value, property of a national bank was so assessed, but on appeal to the board of equalization the assessment was reduced to 85 per cent of the full value. Held, that the mere fact that other property was assessed at 70 per cent of its value, not through any design or systematic effort on the part of the assessors, would not justify an injunction to restrain the collection of the tax. *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. Ed. 91, 13 S. Ct. 194, affirming 5 N. Mex. 664, 25 Pac. 776.

Inequalities in the valuation of property for taxation, under the constitu-

of suits,⁸ or for the prevention of a cloud on title.⁹ Mere irregularities or defects in the levy or assessment of a tax which is justly due will not, however, afford ground for relief against the collection of such tax.¹⁰

§ 332 (2ab) Jurisdiction.—A national bank may maintain a suit in a federal court to enforce the right given by a state statute to enjoin the collection of taxes levied on an illegal assessment.¹¹

§ 332 (2ac) Conditions Precedent.—As to necessity for payment or tender of amount of tax justly due, as a condition precedent, where the owner of taxable property seeks to enjoin collection of a tax thereon which he alleges to be excessive, see ante, "Tender," § 331 (2).

§ 332 (2ad) Parties.—In General.—In accordance with the general rule as to parties in equitable proceedings, only those interested, and who may be injuriously affected by the collection of a tax on banks or shares of

tion and laws of a state requiring that all property shall be taxed upon its value by a uniform rule, afford no ground for relief, unless it be made to appear that such inequalities result not merely from error in judgment on the part of the assessing officer, but it must appear also that there was an intentional discrimination. The same rule applies to the valuation of shares in national banks for taxation, where it appears that they were actually assessed at a greater rate than other moneyed capital in the hands of individual taxpayers of the state. Intentional discrimination may be established by proof of inequalities so gross as to lead the court to the conclusion that they were designed. But the facts do not warrant such conclusion in this case. *Exchange Nat. Bank v. Miller*, 19 Fed. 372.

8. To prevent multiplicity of suits.—Where an assessment of the shares of a national banking association was void for want of power in the assessors, a bill in equity will lie, upon the complaint of the bank, to restrain the collection of the amounts severally assessed upon the shares of the respective shareholders, in order to prevent a multiplicity of suits. *National Albany Exch. Bank v. Hills*, 5 Fed. 248, 18 Blatchf. 478.

Where assessors fail to place the name of shareholders in a national bank on the assessment roll, in accordance with the requirements of the state statutes, thereby rendering the tax illegal, equity may, in order to prevent a multiplicity of suits, enjoin the collection of such tax on the application of the bank, where the latter is required by the statute under which the

assessment was made to retain so much of any dividend or dividends belonging to such shareholders as shall be necessary to pay any taxes assessed in pursuance of the act. *Albany City Nat. Bank v. Maher*, 6 Fed. 417, 19 Blatchf. 175.

9. To prevent cloud on title.—Where the entire capital stock of a bank is taken as a basis of valuation of a stockholder's shares, for purposes of taxation, without deducting the amount legally invested in real estate, as provided by Laws 1891, c. 14, § 24, the stockholders, after paying all that could be lawfully assessed against his shares, may sue in equity to restrain collection of the tax, which, being regular on its face, creates an apparent lien on his land. *Macomb v. Lake County*, 9 S. Dak. 466, 70 N. W. 652.

10. Irregularities or defects in levy or assessment.—Where the assessing officers, in taxing national bank shares, have arrived at a correct result, the collection of the taxes will not be restrained, because the method was erroneous. *St. Louis Nat. Bank v. Papin*, Fed. Cas. No. 12,239, 4 Dill. 29.

The collection of a tax on shares of national bank stock will not be enjoined on the application of a shareholder, upon the mere ground that the tax is illegal because of the failure of the assessors to place the names of the shareholders on the assessment roll. *Albany City Nat. Bank v. Maher*, 6 Fed. 417, 19 Blatchf. 175.

11. Jurisdiction.—Judgment 98 Fed. 465, reversed. *Mercantile Nat. Bank v. Hubbard*, 45 C. C. A. 66, 105 Fed. 809, reversed *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247, 22 S. Ct. 908.

stock therein are entitled to sue for injunction to restrain such collection.¹²

A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank.¹³

Right of Bank to Sue.—According to a number of decisions, where a bank is required by law to pay the taxes assessed on all its shares, and reimburse itself, from its shareholders, it may sue to enjoin the collection of taxes illegally assessed, as it stands in the relation of a trustee, and such suit will save multiplicity of actions.¹⁴ Where, however, shares of stock of an incorporated banking association, are by statute assessable against and payable by the individual owners thereof, it would seem that the bank can not, in its own name, and for itself, sue to restrain the collection of the tax on such shares from the individual owners.¹⁵ Two banks,

12. Interest essential to right to sue.

—By the Revenue Law of Indiana of 1872, capital represented by credits, which include money at interest within or without the state, is not taxed for its full or fair value, but only on the balance which may remain after deducting the amount of the taxpayer's bona fide indebtedness; while capital represented by national bank stock is taxed according to its fair value, without allowance for debts. Held that, while the law is in conflict with § 5219, Rev. Stat. [U. S. Comp. St. 1901, p. 3502], and therefore invalid, only such shareholders are entitled to relief as are subject to taxation in the state upon their credits, and who, at the time of the assessment of taxes under this law, had debts which were not deducted from their credits because they had none, and which were not deducted from the valuation of the bank shares, because the state law would not permit it to be done. *Evansville Nat. Bank v. Britton*, 8 Fed. 867, 10 Biss. 503.

13. Right of receiver to sue to enjoin collection.—*Brown v. French*, 80 Fed. 166.

14. Right of bank to sue.—*Whitney Nat. Bank v. Parker*, 41 Fed. 402; *Evansville Nat. Bank v. Britton*, 8 Fed. 867, 10 Biss. 503; *Jones v. Rushville Nat. Bank*, 138 Ind. 87, 37 N. E. 338.

Where a state statute provides for a tax on the stock of a national bank and requires the bank to pay it, the bank is in effect made a trustee and has the right to resort to a court of equity to determine its duty for its protection against the state, on the one hand, and the stockholders, on the other. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

Where a statute providing for the taxation of bank shares imposes duties and liabilities on the bank, as by requiring it to withhold dividends from its stockholders and apply the same to the payment of the taxes on their stock, and subjecting it to heavy penalties for failure to comply with such requirements, it may maintain a suit in equity on behalf of its stockholders to test the validity of such statute, to enjoin its enforcement if found invalid. *People's Nat. Bank v. Marye*, 107 Fed. 570. Modified and affirmed in 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

15. Northwestern Loan, etc., Co. v. Muggli, 7 S. Dak. 527, 64 N. W. 1122; S. C., 8 S. Dak. 160, 65 N. W. 442. And see *First Nat. Bank v. Meredith*, 44 Mo. 500.

A bank can not maintain a suit in equity on behalf of its shareholders to enjoin the collection of taxes levied on the shares, where the shareholders themselves could not maintain such suit, and where the statute under which the taxes are levied imposes no duty or liability on the bank in respect to same. *People's Nat. Bank v. Marye*, 107 Fed. 570. Modified and affirmed in 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

Act Va. March 6, 1890, providing for the taxation of bank shares, required the banks to pay the taxes levied thereunder against their stockholders, and provided that, in case a bank failed to make such payment within a certain time, the cashier and his sureties should be liable therefor, with an added penalty, to be recovered at suit of the state. Act March 3, 1896, providing for the collection of delinquent taxes on bank shares, left

against whose stock illegal taxes have alike been separately assessed, can not join in a suit to enjoin the collection.¹⁶

A shareholder, who has made the affidavit and demand therefor required by law, may bring suit to enjoin the collection of a state tax on the shares of a national bank, on the ground of the illegal assessment arising from the failure to deduct from the valuation the debts owed by the shareholders.¹⁷

§ 332 (2ae) Pleading.—In an application for an injunction to restrain the collection of a tax on a bank, the usual rule as to pleadings in equitable proceedings applies, and the applicant must in his pleading make a case showing that he is entitled to the relief demanded.¹⁸ A bill to restrain the collection of a state tax upon the shares of a national bank is bad on de-

it optional with a bank to pay such taxes levied against its stockholders, and provided that, in case it did not elect to make such payment after notice, suits should be instituted for the collection of the same from the stockholders individually. Held, that whether the later act be regarded as repealing the provision of the one under which the taxes were levied, authorizing suit against the cashier, or as merely providing a cumulative remedy, a national bank could not maintain a suit to enjoin officers of the state from proceeding to collect such taxes, upon an allegation that the statute imposing the same was discriminative and invalid, under the laws of the United States, as applied to national bank shares, where it was not alleged that any action was threatened or contemplated against the bank itself, since, in suits against the stockholders under the latter act, they had full opportunity to make any defense, and neither they, nor the bank in their behalf, had any ground for injunction. *People's Nat. Bank v. Marye*, 107 Fed. 570. Modified and affirmed in 191 U. S. 272, 48 L. Ed. 180, 24 S. Ct. 68.

A bank can not maintain an action to restrain a collector of taxes from selling shares in the bank of individual stockholders for unpaid taxes thereon. *Waseca County Bank v. McKenna*, 32 Minn. 468, 21 N. W. 556; *Northwestern Loan, etc., Co. v. Muggli*, 8 S. Dak. 160, 65 N. W. 442.

Rev. St., § 2746, provides that investments in bonds, stocks, etc., shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, but no person shall be required to list for taxation shares of the capital stock of any company the capital stock of which is taxed in the name of such company; and 64 Ohio Laws, p. 204, provides that incorpo-

rated banks shall be exempt from taxation except on real estate, and declares that in lieu thereof the shares of stock held by the bank shall be taxed. Held that, since a tax assessed against the shares of a bank were not assessed against the bank, it was not entitled to appear for its stockholders, and institute proceedings to enjoin the collection of taxes assessed on its shares. *Cleveland Trust Co. v. Lander*, 10 O. C. D. 452, 19 O. C. C. 271.

16. Joinder of banks as parties to plaintiff.—*Jones v. Rushville Nat. Bank*, 138 Ind. 87, 37 N. E. 338.

17. Right of shareholder to sue.—*Hills v. National Albany Exch. Bank*, 12 Fed. 93.

18. Complaint held to show case for relief.—A complaint by a bank against a county treasurer to enjoin the collection of a tax was not demurrable, for want of facts, where it appeared on the record that the valuation of the capital stock and property was entered on the tax duplicate at \$143,110, the amount to which it was increased by the county board of review, and that plaintiff paid the taxes at that rate on \$113,110, and brought the action to enjoin the remainder of the taxes charged on the duplicate, stating that the state board of tax commissioners had on appeal assessed the taxes and property at \$113,110. *First Nat. Bank v. Greger*, 157 Ind. 479, 62 N. E. 21.

Insufficient showing for equitable relief.—Where the president of a bank makes a return to the proper assessor, verified by his oath, showing that the bank is owner of stock in a corporation of a certain value, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, the bank can not enjoin the collection of such taxes on the ground that its capital stock is held by individual stockholders, as no

murrer, where it does not appear that there is any statutory discrimination against them, or that they, under any rule established by the assessing officers, are rated higher in proportion to their actual value than other moneyed capital.¹⁹

§ 332 (2af) Scope of Inquiry.—Where it is shown that an affidavit and demand for the deduction of shareholders' debts from the valuation of bank shares for taxation would have been unavailing, the shareholders may be permitted to show in an action by a national bank, brought on their behalf, the deductions to which they were entitled, and the collection of the amount of such deductions would be enjoined.²⁰

§ 332 (2ag) Scope and Extent of Relief.—Where national bank shares are taxed beyond the limit established by congress, an injunction will be granted only as to such excess.²¹

§ 332 (2ah) Imposition of Terms on Granting Injunction.—Upon

showing for equitable relief on the part of the bank is presented, since the assessment and levy complained of were induced solely by the action of the bank. *Winfield Bank v. Nipp*, 47 Kan. 744, 28 Pac. 1015.

Where the cashier of a bank organized under the state law delivers to the assessor a personal property statement of the taxable property of the bank, and by mistake gives an amount exceeding that for which the bank is liable to be taxed, but does not give any list of the stockholders or the amount of the undivided profits or surplus, as required by law, and this is never done by any agent or officer of the bank, and no proper steps are ever taken to correct the mistake made by the cashier, the collection of taxes afterwards levied on the amount so given by the cashier will not be restrained, it not appearing that the stockholders have been assessed or taxed, or that the taxes against the bank are more than it and its stockholders should pay. *Bank v. Buster*, 50 Kan. 356, 31 Pac. 1094.

19. *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

The bill in the case averred that the same percentage was assessed on such shares as on other property, and that they were rated at about one-half their actual value. No case for relief was made by averring that the assessments were unequal and partial, and some other property was rated for taxable purposes less than one-half of its cash value. *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

A bill to restrain the collection of the state tax on shares of a national

bank is bad on demurrer, when it does not appear that there is any statutory discrimination against them, or that they, under any rule established by the assessing officers, are rated higher in proportion to their actual value than other moneyed capital; and averments that the assessments were unequal and partial are not sufficient. *Wagoner v. Loomis*, 37 O. St. 571.

While a provision of a state revenue statute that stockholders in national banks shall not be entitled to any deduction from the assessed valuation of their shares because of debts owed by them, while owners of other "money, credits, or investments" are allowed such deduction, is invalid as applied to a stockholder who owes debts and who has not sufficient other money, credits, or investments from which such debts may be deducted, as subjecting him to taxation "at a greater rate than is assessed on other moneyed capital in the hands of individual citizens" of the state, in violation of Rev. St., § 5219 (U. S. Comp. St. 1901, p. 3502), it is not so invalid as to a stockholder who is not actually affected by it to his detriment, and a bill filed by a bank to enjoin the collection of taxes imposed on its stockholders because of such provision must allege facts showing the portion of the tax so rendered illegal, and that the valid portion has been paid or tendered, in order to entitle the complainant to equitable relief. *Charleston Nat. Bank v. Melton*, 171 Fed. 743.

20. *Scope of inquiry.*—*Hills v. National Albany Exch. Bank*, 12 Fed. 93.

21. *Relief granted only as to excess.*—*Whitney Nat. Bank v. Parker*, 41 Fed. 402.

a bill in equity to enjoin the collection of a tax upon shares in a national bank because the tax was greater than that imposed on state banks, the injunction was granted only upon condition that the complainants or their bank would pay a tax equal to that which might have been lawfully assessed upon them or their bank had it been a state bank.²²

§ 332 (2b) Actions for Damages.—A sheriff who wrongfully seized bank property to satisfy a tax levy against a stockholder on his bank stock is liable to the bank for actual damages, the fact that the bank could have treated the conversion of its property as a payment in behalf of the stockholder being no defense.²³

§ 333. Forfeitures and Penalties.—Penalty for Nonpayment of Tax.—A national bank, having tendered payment of the taxes legally due from it, in accordance with its rendition of property for taxation, and before the time fixed by the statute for the accrual of the penalty for nonpayment, is not liable for the penalty in an action to recover in addition an amount exceeding that which was legally due, and for which it was not liable.²⁴

Penalty for Failure to List Shares of Stock.—Where officers of a bank fail to list the shares of stock for taxation as required by statute,²⁵ a penalty is usually imposed for such failure.²⁶

Persons Liable for Penalties.—The president of a bank is not liable in his private capacity for the penalty imposed by the statute of 1820, for not paying taxes due from the bank.²⁷

Pleading in Action for Penalty.—In a summary proceeding against the president for a penalty for default of the bank, the bank must be described by its name of incorporation.²⁸

22. Payment of lawful tax as condition of granting injunction.—*Frazer v. Siebern*, 16 O. St. 614.

23. Actions for damages.—*First Nat. Bank v. Lyman*, 59 Kan. 410, 53 Pac. 125, reversing *Lyman v. First Nat. Bank*, 6 Kan. App. 74, 40 Pac. 639.

24. Tender as relieving from penalty for nonpayment.—*First Nat. Bank v. Lamadasas*, 38 Tex. App. 330, 38 S. W. 42.

25. Duty to make report.—See ante, "Report of Statement by Bank," § 329 (1b).

26. Penalty for failure to list shares of stock for taxation.—The fact that a bank keeps a list of stockholders, as required by the act of congress, from which the listers of the town may and did transcribe such stock as they deemed taxable, does not mitigate the penalty imposed on the cashier for failure to have transmitted to the town clerk a list of names of the stockholders, as required by Laws

1865, No. 60. *Newman v. Wait*, 46 Vt. 689.

Ky. St. 1903, § 4241, authorizes the taxation of property omitted from taxation in any previous year and the imposition of a penalty. Act March 21, 1900 (Acts 1900, p. 65, c. 23), relative to taxation of national banks, provides that the president and cashier shall list the shares of stock in the bank for taxation. Held, that where the officers fail to so list the shares a penalty might properly be imposed in the proceedings for their taxation as omitted property. *Commonwealth v. Citizens' Nat. Bank*, 117 Ky. 946, 25 Ky. L. Rep. 2100, 80 S. W. 158, dismissed *Citizens' Nat. Bank v. Kentucky*, 199 U. S. 603, 50 L. Ed. 329, 26 S. Ct. 750.

27. President of bank not personally liable for penalty.—*Judson v. State (Ala.)*, Minor 150.

28. Description of bank in action for penalty.—*Judson v. State (Ala.)*, Minor 150.

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